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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO

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Coordination Proceeding Special Title (Rule 1550(b)) In re TOBACCO CASES II This document relates to: The People of the State of California, et al. v. Philip Morris Incorporated, et al., Los Angeles Superior Court Case No. BC 194217; The People of the State of California, et al. v. General Cigar Co., et al., San Francisco Superior Court Case No. 996780; The People of the State of California, et al. v. Brown & Williamson, et al., San Francisco Superior Court Case No. 996781; and The People of the State of California, et al. v. Tobacco Exporters, et al., San Francisco Superior Court Case No. 301631.	JCCP No. 4042

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DEPOSITION OF

W. KIP VISCUSI, Ph.D.

Wednesday, September 22, 1999

REPORTED BY: ANA M. DUB, RMR, CRR, CSR 7445 05-83413

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BE IT REMEMBERED that, pursuant to Notice, and on Wednesday, September 22, 1999, commencing at 9:08 a.m. thereof, at the Law Offices of Preston Gates & Ellis LLP, One Maritime Plaza, Suite 2400, San Francisco, California, before me, ANA M. DUB, RMR, CRR, a Certified Shorthand Reporter, personally appeared

W. KIP VISCUSI, Ph.D.

called as a witness by the Plaintiffs, who, having

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been first duly sworn, was examined and testified as follows:

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EXAMINATION BY MR. BROOKEY

(Mr. Todzo and Mr. Miles not present.)

MR. BROOKEY: Q. Good morning, Mr. Viscusi.

A. Good morning.

Q. We met a few moments ago. My name, again, is Brian Brookey. I'm an attorney at Preston Gates & Ellis, and we're one of the attorneys for plaintiffs in a group of cases generally referred to as the Prop 65 ETS cases. And we have asked for you to give testimony today in connection with those cases.

Do you understand that?

A. Yes.

Q. You've had your deposition taken a number of times before, haven't you?

A. Yes.

Q. You're generally familiar with the procedures?

A. Yes.

Q. Rather than take you through what we often call admonitions, then, in light of your extensive experience as an expert, I think I'd just like to point out a couple of -- a couple of items, mainly by way of reminder, the first of which is to remind you, Dr. Viscusi, that you're under oath today and you're

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required to give complete and truthful testimony today and will be signing the deposition transcript or will be asked to sign the deposition transcript under penalty of perjury.

Do you understand that?

A. So it's not just read and -- I don't necessarily have to sign it in this state?

Q. There's a procedure governed by the Code of Civil Procedure, and we'll talk about that at the conclusion of the deposition.

A. Fine.

Q. But you're not -- just in case your attorneys haven't told you, you're not required to sign the original transcript; but if you don't sign it and make changes, then the transcript will be able to be used as if you had signed it under penalty of perjury with no changes.

A. That sounds fine.

MS. SHERIDAN: But like in most circumstances, you'll have the opportunity to review the transcript once it's completed.

(Mr. Todzo joins the proceedings.)

MR. BROOKEY: Q. The second logistical item I'd like to point out is that if you need to take a break at any time during the proceedings today, please ask me and I will try to accommodate you. The only request that I would make to you is that you don't ask for a break between my asking a question and

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your answering it, unless you need to consult with your attorney regarding a claim of privilege.

(Telephone interruption.)

MR. BROOKEY: That was Mr. Miles making sure that I got his message to go ahead and start without him. He said he should be here within about half an hour or 45 minutes.

Q. Mr. Viscusi, do you have any questions about the logistical aspects of today before we proceed?

A. No.

MR. BROOKEY: All right. I would like to ask the court reporter to mark as Exhibit 79 a copy of your declaration, including the exhibits.

(Whereupon, Plaintiffs' Exhibit 79 was marked for identification.)

MR. BROOKEY: Q. Dr. Viscusi, you've seen this document before, haven't you?

A. Yes.

Q. Could you please turn to page 12 of your declaration. Do you see that?

A. I have page 12.

Q. And does that appear to be your signature above the signature line?

A. It is.

Q. Do you recall signing this declaration on the 14th day of September, 1999, at Cambridge,

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Massachusetts?

A. Yes.

Q. And you'll see that this declaration has only one word of substantive text, and that's the word "function" on the top of the page?

A. That's correct.

Q. At the time you signed this, did you have in front of you pages 1 through 11 of the declaration in the form in which it exists today?

A. I haven't reread the form that exists today, so I'd have to go back through it. I hadn't noticed any changes.

Q. How many drafts of the declaration were prepared prior to the one you ended up signing?

A. Well, are we going to count all the rounds of typos by my secretary?

Q. Yes.

A. I would say it took her at least five times to incorporate my changes and corrections and formatting and indenting and things like that. Other than that, I'd say it went through two drafts.

Q. Who originally asked you to prepare this declaration?

A. Stephanie Sheridan.

Q. And did Ms. Sheridan's office write any portion of the declaration --

A. No.

Q. -- for you?

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A. No.
Q. So every word in here is word for word from you?
A. Every word is mine. What they did do is suggest that I should say "See Exhibit A." So that insert was from their office and I think a few other words, but a maximum of three or four words, just stylistic things, inserting the word "the" at one point.
Q. If I recall your testimony correctly, you said that in addition to the series of edits that were mainly of a typographical nature, you would consider there to have been two prior drafts of this declaration, is that correct?
A. It eventually went through two drafts: an initial draft, I incorporated "See Exhibit A," or whatever it was, and the three or four words. That's it. Those are the only two substantive drafts, if you exclude typos.
Q. You're currently the John F. Cogan, Jr., professor of law and economics at Harvard Law School; is that correct?
A. That's right.
Q. What is the significance of that title, the John F. Cogan, Jr., professor title?
A. Well, it's an endowed chair at Harvard Law School, where John F. Cogan, Jr., donated the money to Harvard Law School. And so it's a tenured position at

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Harvard Law School.

Q. How long have you held that endowed chair?

A. This is my fourth year.

Q. Is there a term, or are you there indefinitely?

A. So long as I'm alive, I can keep this job.

Q. Is John F. Cogan, Jr., still alive?

A. Yes, he is.

Q. What ties, if any, does he have to the tobacco industry?

A. None that I know of.

Q. You don't actually have a law degree; correct?

A. That's correct.

Q. Are there any other professors at Harvard Law School who do not have a law degree?

A. There's two other chaired professors, but there's one other full professor who has an economics degree, but not a law degree. And I don't know about other disciplines. We have a psychologist on the faculty. I'm not sure if he has a law degree or not.

Q. Do you have any legal training at all?

A. I'm not sure what you mean by that. I teach judges in various programs. I've never been to law school.

Q. Have you ever taken any type of courses in law; for instance, an undergraduate business law course?

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A. I took an undergrad law course at Harvard.
Q. What was the name of that course?
A. It's a while ago. I think it's something like "Introduction to the Legal Process." Paul Freund was the teacher.
Q. Have you taken any other legal classes?
A. I've taken no courses at law schools. Legal issues come up in a variety of my courses.
Q. So you certainly don't consider yourself an expert in legal matters; correct?
MR. KAPLAN: Overbroad, vague, ambiguous. This may be a good time. Do you want to have the same stipulation that we had for the other -- some of the other depositions, that an objection by one attorney constitutes an objection by all of the attorneys on the same side?
MR. BROCKEY: If that's acceptable to Ms. Sheridan, who's defending this witness.
MS. SHERIDAN: Yes, it is.
MR. BROCKEY: All right. That's fine.
THE WITNESS: I would like to say basically the same thing, that it is an overly broad characterization in that I was an associate reporter for an American Law Institute report. If I knew nothing about legal matters, I'm sure they wouldn't have picked me for that. So I'm not sure what you mean by this.
MS. SHERIDAN: And you've also just

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established from the witness's testimony that he is a professor at Harvard Law School. So if you want to narrow your question.

MR. BROOKEY: Q. Well, there's a difference between knowing nothing about the law and being an expert in the law; correct?

MS. MYLES: Objection; argumentative.

MS. SHERIDAN: What area of the law are you talking about? Your question's still so hopelessly overvague -- overbroad that it's hard for him to answer.

THE WITNESS: I agree with these comments. And the fact that they did make me a chaired professor at Harvard Law School must mean I know something about what's going on at the school. I'm not there just taking out the trash.

MR. BROOKEY: Q. You've never held yourself out as a lawyer, though, have you?

A. That's correct.

Q. And you've never advised any company as to how to comply with existing laws, have you?

MS. SHERIDAN: I object to the extent that that may call for proprietary information as to any client that he may have consulted with.

To the extent it doesn't violate anybody else's privacy rights for any clients you may have consulted with, you may respond.

THE WITNESS: I have advised clients

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regarding issues with legal implications and methods of compliance that I thought would be adequate.

MR. BROOKEY: Q. So you've actually given them legal opinions as to what types of activities would comply with the law?

MS. SHERIDAN: Objection; mischaracterizes the witness's testimony. He didn't say he was giving legal opinions to any clients.

THE WITNESS: I've given them opinions based on my disciplinary background and the particular context involved as to what the appropriate courses of action should be.

MR. BROOKEY: Q. Have you ever examined a company's activities in the state of California and formed an opinion as to whether those activities complied with Proposition 65?

MS. SHERIDAN: I'll just raise the same objection I did earlier, to the extent it may raise proprietary issues with any clients you've had consulting relationships with.

THE WITNESS: Well, as you know, I testified on Proposition 65 in court. And as part of that, I did discuss what I thought were appropriate methods of compliance. That's different than giving a legal opinion from a hazard warning standpoint.

MR. BROOKEY: Q. That's also different from my question. What I asked was: Have you ever examined a company's activities in the state of

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California and formed an opinion as to whether those activities complied with Proposition 65?

MS. SHERIDAN: The witness has testified that he's testified in court on a Prop 65 matter. Is that not what you're asking about?

THE WITNESS: And as part of that, I talked to companies about Prop 65 -- to trade associations representing companies.

MR. BROOKEY: Q. What types of trade associations?

A. Food Industry Safety Council is one group that existed back then. Grocery Manufacturers Association.

Q. Is that it?

A. Carnation. Quaker Oats, I think, was another group that was represented. That's all I can recall. This is about 13 years ago.

Q. 13 years ago, of course, was during the infancy of Proposition 65; correct?

A. It may have been 14 years ago. It's back then, yes, during the infancy, that's correct.

Q. So have you kept abreast of current developments in the field of Proposition 65 compliance?

MR. KAPLAN: Overbroad, vague.

THE WITNESS: I've reviewed the various documents that I mentioned in my declaration as well as other materials. But have I had an ongoing

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consulting relationship with companies regarding Proposition 65? No.

MR. BROOKEY: Q. Now, going back to your educational background, did you take any classes at any time in science?

A. Yes.

Q. How many?

A. I don't know the count. You're talking about college classes, high school classes?

Q. College, college and above.

A. Well, I've taken college physics, college chemistry, another college physics class, statistics, advanced calculus, engineering -- I took several engineering sciences courses at Harvard, math courses, economics courses or social science. Those are the ones that come to mind.

Q. Have you taken any classes in the life sciences, such as biology or physiology?

A. No.

Q. What about epidemiology?

A. No.

Q. What about environmental engineering?

A. I teach courses on the environment. I've taken interdisciplinary courses. But Harvard doesn't have an environmental engineering department, at least they didn't when I was there.

Q. What about environmental science?

MS. SHERIDAN: What about has he taken it,

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or what about does Harvard offer it?

MR. BROOKEY: Has he taken it.

THE WITNESS: Well, it depends on what you call environmental science. If you call social science science, then I've taken it and teach it.

MR. BROOKEY: Q. Let me make it simple. Have you ever taken a class entitled "Environmental Science"?

A. No, I've never taken a course with that name.

Q. You've never taken any classes in toxicology; correct?

A. Definitely not.

Q. You've never taken any classes in the etiology of diseases; is that correct?

A. That's correct.

Q. You've never taken any classes at a medical school; correct?

A. I've taught in a medical school, but never taken courses there.

Q. At which medical school have you taught?

A. Duke.

Q. What class did you teach there?

A. Economics. It was health economics.

Q. And were you accepting money from the tobacco industry at the time you taught at the medical school at Duke?

A. Well, I'm not sure what you mean by

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"accepting money," but at that time I wasn't consulting for any tobacco-related issues for anybody.

Q. Did Duke have any policies regarding whether any of its faculty members could take money from the tobacco industry at the time you were there?

MS. SHERIDAN: Objection; foundation.

THE WITNESS: What kind of policies would they have? I mean --

MR. BROOKEY: Q. "Don't," for instance.

A. I don't know of any school that has a policy regarding that. Harvard doesn't. Duke doesn't, as far as I know, either.

Q. Do you have any educational background in advertising?

A. Well, advertising, if you look at the marketing literature, is really what I would call applied industrial organization, which is an area where I do have expertise. And I've worked with marketing professors and coauthored papers with marketing professors for the past 15 years. So the economic aspects, yes, I have expertise in economics.

Q. Okay. My question wasn't whether you say you have expertise. It's whether you have an educational background in advertising. In other words, have you taken any classes in advertising?

A. Yes. In the sense that I've not taken classes on advertising in terms of how to design an ad, but if you view advertising as part of marketing

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efforts, which are part of the economics of product markets, that aspect I've taken courses in.

Q. So you have taken courses in marketing?

A. No. I've taken courses in the economics of product markets, and I've taught in a business school where basically marketing is just that. It's just product market analysis.

Q. So you're not an expert in advertising as a broad proposition; correct?

A. I wouldn't characterize my expertise that way.

Q. Have you had any classes, college level and above, in communications?

MR. KAPLAN: Overbroad.

MS. MYLES: Vague and ambiguous.

THE WITNESS: What do you mean by "communications"?

MR. BROOKEY: Q. Well, for instance, have you ever taken a class called "Communications"?

A. No.

Q. And when you were at college, did Harvard have a communications major? Would it have been possible to get a degree in communications?

A. No. They don't offer that.

Q. Do they now?

A. I haven't seen it in the catalog.

Q. So your expertise is really limited to economic issues; correct?

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MS. MYLES: Objection; overbroad, misstates his testimony.

MS. SHERIDAN: And argumentative.

THE WITNESS: I view my expertise as cutting across a variety of disciplines; and these, for the most part, are represented by the interdisciplinary journal I run. So it cuts across psychology, decision sciences, and economics, which is a fairly broad sweep.

MR. BROOKEY: Q. Sure. Do you have any educational background in psychology?

A. A variety of psychological issues and themes from the psychology literature and papers from the psychology literature did appear in courses I took. I did not major in psychology.

Q. But again, you never took a class called "Psychology"; correct?

A. Well, I took classes on decisions under uncertainty, which would include perspectives from a variety of disciplines, including psychology.

(Mr. Miles joins the proceedings.)

MR. BROOKEY: Q. But again, you never took a class called "Psychology"; correct?

A. Well, there was probably one course at Harvard called "Psychology," but there may be a couple hundred courses that deal with psychological issues that don't have that name.

Q. Have you ever taken any classes relating to

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how to conduct a consumer survey?

A. I've taken courses on survey design, generally, and I've been developing surveys for the EPA for over a decade, so I have experience doing this.

Q. Are you an expert on designing consumer surveys?

A. Within the class of the things I do, yes.

Q. And what is the class of things you do?

MS. SHERIDAN: Asked and answered.

THE WITNESS: The -- well, in the case of consumer surveys, I could list the ones we've done for the EPA. They've focused on hazard warnings, risk communication, evaluation issues; so trying to ascertain people's preferences and attitudes towards products, precautions, risks.

MR. BROOKEY: Q. How many interdisciplinary journals currently focus on individual and societal responses to risk?

A. I don't know the count, but there's at least three.

Q. What are they?

A. The three that come to mind are Journal of Risk and Uncertainty, Journal of Behavioral Decision Making, Risk Analysis. Management Science also does this. Even American Economic Review publishes papers by psychologists from time to time. Journal of Policy Analysis of Management.

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So there are a lot that occasionally do it, but in terms of the ones that specialize in it, the three leading ones would be Journal of Risk and Uncertainty, Journal of Behavioral Decision Making and Risk Analysis.

Q. And the Journal of Risk and Uncertainty is the leading one of those journals?

A. In terms of Social Sciences Citation Index citations, yes.

Q. What about in other terms?

A. I don't know any other objective ranking. That's the main one.

Q. And do you happen to serve as an editor on any of these journals other than the Journal of Risk and Uncertainty?

A. Well, I'm on nine or ten editorial boards.

Q. I'm talking about the three that you mentioned that focus specifically on individual and societal responses to risk.

MS. SHERIDAN: Other than the one he's already testified about being an editor for?

MR. BROOKEY: Right.

THE WITNESS: So the one I run, I do.

I'm also on Geneva Papers on Risk and Insurance Theory editorial board, which is interdisciplinary, but that's a European journal.

MR. BROOKEY: Q. Have you heard anyone other than yourself characterize the Journal of Risk

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and Uncertainty as the leading interdisciplinary journal focusing on individual and societal responses to risk?

A. Probably my publisher.

Q. How about someone without a financial interest in that journal?

A. We circulate the Social Sciences Citation Index rankings. And in finance, we're ranked second, in business and finance, after the Journal of Finance. It's been our highest ranking. Economics, we're consistently top 20 out of over a hundred journals ranked. So the rankings are the main things that we circulate to document the claim.

Q. You've written 17 books; is that correct?

A. 17 that are out, yes.

Q. How many of those are still in print?

A. I have no idea. The -- I know the smoking book sold out.

Q. And that's Smoking: Making the Risky Decision?

A. Right.

Q. So if I had information that said it was out of print, that information would be wrong?

A. That's what I mean, sold out all the copies.

Q. Okay. So there's not going to be another press run of this book?

A. No.

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Q. Is that book used as a text in any courses at Harvard other than the ones you teach?
A. It's not even used as a text in my courses.
Q. Is it used as a text anywhere in the country?
A. I don't know. It's sold out, so I don't think it's -- you can -- it was never a textbook.
Q. Did you receive an advance for that book when you were writing it?
A. I don't recall.
Q. Did you receive money from the tobacco industry in connection with that book?
A. No money.
Q. Okay. How much money have you received from the tobacco industry in 1999?
A. I actually don't know. It could be under a thousand dollars, or it could be more. I'm not sure if the Ohio Ironworkers case was this year or last year. It was sold. So if that was done last year, then maybe just a couple thousand dollars. It's a ballpark, but a small amount of money.
Q. How much money have you been paid in connection with your work on this litigation?
MS. SHERIDAN: Foundation.
THE WITNESS: I haven't been paid anything.
MR. BROOKEY: Q. How much have you billed for your work on this litigation?
A. I haven't billed anything.

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Q. Have you kept time records?
A. Yes.
Q. How much time have you spent working on this litigation?
A. I don't know exactly, but I'd ballpark it around 50 hours before my trip.
Q. 50 hours before your trip?
A. Before my trip. That's a rough estimate.
Q. And I understand you're billing plaintiffs $500 -- I'm sorry -- $2,000 for a half day, $4,000 for a day, $500 per hour for more than a full day; correct?
A. I think we're quitting after a day. So, yes, you've got the rates right. 2,000 for half day, 4,000 for the whole day or anything that goes into the afternoon.
Q. And is that the same rate you charge the tobacco industry?
A. They're charged a $500 rate for all work.
Q. So what is 500 times 50?
MS. SHERIDAN: You can do the math, Counsel.
THE WITNESS: Without borrowing a calculator, I think it's about $25,000.
MR. BROOKEY: Q. So the tobacco industry owes you approximately $25,000, correct, for your work on this case?
A. Approximately. I don't know the exact

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number of hours.
Q. And when do you plan to bill them for that?
A. When I get back.
Q. Do you get any -- do you have a written retainer agreement with any of the cigarette companies that are defendants to this litigation?
MS. SHERIDAN: For this litigation?
MR. BROOKEY: Yes, this litigation.
THE WITNESS: I may. I'm not sure. I may have one, a letter, but -- you know, I have letter correspondence to me from them indicating that I'm working on the case, which indicated that I was hired. We discussed my rate.
MR. BROOKEY: Q. Who hired you?
A. My contact, principal contact has been with Stephanie Sheridan.
Q. Is it your understanding you're here today testifying as an expert witness for R.J. Reynolds?
A. I'm not aware that I'm representing any particular company. I assume that there's a whole cluster of them represented I'd be testifying on behalf of.
Q. Does that include Liggett?
MS. SHERIDAN: He's just answered the question.
THE WITNESS: I don't know.
MS. MYLES: Objection; lacks foundation.
MR. BROOKEY: Q. You can answer.

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A. I don't know.
Q. And when you send your bill, you're going to send it to Ms. Sheridan; is that correct?
A. That's correct.
Q. And any arrangements that R.J. Reynolds may have with other defendants as to how to allocate the responsibility is not any concern to you; correct?
A. That's correct.
Q. When were you first asked to work on this litigation?
A. Last summer. I believe it was the start of August, but it might have been July. It might have been sooner.
Q. Who approached you?
A. Stephanie Sheridan.
Q. How long did it take you to make the decision to assist in this litigation?
A. Well, there's different levels of assistance. They asked if I'd be interested in reviewing some materials first. They sent me some materials to review. At that time I wasn't asked to prepare anything or do anything, just to review materials regarding Proposition 65.
Q. What materials were you sent?
A. Boxes of things like this.
Q. Okay.
A. Several boxes.
Q. Several boxes that were sent to you from

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Ms. Sheridan?

A. Mr. Kaplan sent me many things as well. He may have been the main person sending me things.

Q. So if you had an original retainer agreement, would that be with Mr. Kaplan's firm?

MS. SHERIDAN: Objection; lacks foundation, assumes facts not in evidence.

THE WITNESS: I don't know if I have a retainer agreement. I know I've received letters from Stephanie Sheridan, and I've received boxes of materials from Mr. Kaplan as well.

MR. BROOKEY: Q. And do you keep a file in your office with respect to the work you've performed on this case?

A. I've got a few boxes sitting on my floor of that, and I have -- in those boxes I've tossed some of the letters that I've gotten.

Q. Have you communicated with any of the parties, including their lawyers, in this litigation via e-mail?

A. No, I don't think so.

Q. When you were first asked to do work on this case, what did you do to make sure you didn't have any conflict of interest?

MS. MYLES: Objection; vague and ambiguous, overbroad.

THE WITNESS: I'm not sure what conflicts of interest I would have.

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MR. BROOKEY: Q. Because you testify in tobacco-related matters exclusively on behalf of the tobacco industry; correct?

MS. SHERIDAN: Argumentative.

THE WITNESS: Well, I've yet to be asked -- I've never been asked to testify on behalf of the plaintiffs. I have worked for EPA on tobacco-related matters.

MR. BROOKEY: I understand that. We'll get to that a little bit later.

Q. If a plaintiff asked you to serve as an expert witness adverse to the tobacco industry, would you automatically say no to that request?

MR. MILES: Incomplete hypothetical, calls for speculation.

THE WITNESS: It depends on the issue for all cases. There are instances where I've testified against corporations for whom I've done substantial amounts of work in the past, so that's come up.

MR. BROOKEY: Q. But you've never testified against any of the tobacco companies; correct?

MS. SHERIDAN: Asked and answered. He's already said he's never been asked to testify against any tobacco companies.

THE WITNESS: We've covered that.

MR. BROOKEY: Q. Well, I think there's a distinction between being asked by a plaintiff and

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being asked, for instance, by a regulatory agency. So I think the second question is broader.

Have you ever been asked by anyone to testify against any tobacco company?

A. Well, it's interesting. I was asked by a prominent official in the U.S. Department of Labor to testify on the secondhand smoke issue at the OSHA public hearings, which I did. Even though that was on behalf of the industry, I was covering the ground that this prominent official in the labor department wanted in the record but was unable to go out on a limb publicly and hire me to do.

Q. Which prominent official was that?

A. It was the chief economist of the U.S. Department of Labor.

Q. Who was that?

A. Well, since he's not there anymore, it's Alan Krueger.

Q. And where is Mr. Krueger today?

A. Princeton.

Q. How much money were you paid by the tobacco industry, if any, to testify at the OSHA hearing?

A. I wasn't paid anything by the industry. I was paid by Covington & Burling, which I assume was reimbursed by industry groups. I think it was about $10,000, including preparation, everything else.

Q. Thank you. You answered my follow-up question for that.

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Isn't it true that at the OSHA hearing you admitted that you had performed a rather incomplete analysis?

MS. SHERIDAN: Argumentative.

THE WITNESS: I don't -- I don't view that as an admission. This was an analysis that focused on only one aspect of the problem. So it was intentionally focusing on only things that OSHA omitted. So it was not a complete regulatory impact analysis, for which I'd have to be funded a lot more than $10,000. OSHA routinely funds these in the hundreds of thousands of dollars range because they require a lot of work.

MR. BROOKEY: Q. But it is true that you testified at the OSHA hearing that you had performed a, quote, rather incomplete analysis, end quote; correct?

A. I don't recall what I said there. But it was not intended to be a regulatory impact analysis. It was intended to flag key issues.

Q. Well, if the transcript of that OSHA hearing reflected that you testified that you had performed a rather incomplete analysis, would that be an incorrect reflection of your testimony?

MS. SHERIDAN: He's already answered the question.

MS. MYLES: Objection; lacks foundation.

MR. KAPLAN: Calls for speculation.

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THE WITNESS: And I don't recall what I said at the meetings, but I think my earlier answers indicate that I did not consider my analysis to be tantamount to a regulatory impact assessment.

MR. BROOKEY: I'm sorry. Could I have the question read back so I can get an answer, please.

(Record read.)

MS. SHERIDAN: I believe earlier he already said he didn't recall whether or not he had said that. So you continually asking him the same question is badgering the witness at this point.

MR. KAPLAN: And it calls for speculation, since he doesn't have a copy of the transcript in front of him.

THE WITNESS: I don't recall what I said.

MR. BROOKEY: Q. Have you ever reviewed the transcript of the OSHA hearing?

A. No. I was never given one.

Q. What documents did you review to prepare for your testimony today?

A. Is this from ground zero? Are you going to start in August?

Q. Yes, I'll start in August.

A. I don't recall the list, but it's --

MS. SHERIDAN: Let's back up just a little bit. Your question was: What did he review to prepare for the deposition today?

MR. BROOKEY: That's correct.

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MS. SHERIDAN: So are you asking him what he's reviewed in the context of all of the work he's done on this case, or are you asking just what he's reviewed to prepare for today?

MR. KAPLAN: In other words, are you asking what he's reviewed in, like, the last 24 or 48 hours as opposed to all the background information which may come out regarding the deposition today?

MR. BROOKEY: I think the witness and I've established that we're talking about from August through today.

THE WITNESS: Well, I can start. I mean, I reviewed the materials here and some of the ones in my bag. I've got a videotape I reviewed, I saw. And I've got at least a couple more boxes back in my office that were too heavy to bring.

MR. BROOKEY: Q. You're aware that we asked for you to produce some documents today?

MR. SHERIDAN: I would just object to the extent that the first request I had from your office, Mr. Brookey, was faxed to my office on Monday, which was the first day that I understood that you were going to take Dr. Viscusi's deposition.

And I communicated with you yesterday when I called back your office and indicated that we would not be producing any additional documents because everything relied upon in Dr. Viscusi's declaration was publicly available. So there are to be no

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documents produced today.

MR. BROOKEY: Q. Dr. Viscusi, can you answer my question, please.

A. Well, this morning I just came in here cold. So if you're asking what I reviewed this morning, nothing.

If you're asking what I reviewed since August, it's several boxes of materials.

Q. Can you please answer the question that, quote, you're aware that we asked for you to produce some documents today, end quote.

MS. SHERIDAN: Same objection.

THE WITNESS: I found out for the first time that I was going to take this trip Monday. I left Tuesday morning. And I was not aware of any document production. I brought with me the only notes I had on the case, because that sometimes comes up as an issue.

MS. SHERIDAN: And just to be clear, I did, Brian, ask him if he had any earlier drafts of his declaration. I think he's already testified about that. So to the extent you're asking if your request was communicated to the witness, it was. Maybe just not in the exact words that you phrased.

THE WITNESS: I did bring all notes.

MR. BROOKEY: Q. Now, again, let's go backwards from today. You said you came to California yesterday?

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A. Yes.
Q. Did you meet with anyone yesterday to prepare for your deposition today?
A. Yes.
Q. With whom did you meet?
A. Mr. Miles and Ms. Sheridan.
Q. Where did you meet?
A. Ms. Sheridan's office.
Q. For how long?
A. Or, actually, a conference room over there.
Q. For how long did you meet?
A. I actually don't know. I'd say two or three hours, but a lot of that was eating.
Q. Well, Mr. Miles was there.
A. So maybe longer. Maybe four hours. But you know, between getting coffee, eating sandwiches. And some of this was spent where I just, you know, flipped through things, quiet reading.
Q. Do you recall what time the meeting started?
A. No. I think I hit her building around noon and maybe left at around 4:00, but I'm not sure when we started because we ate first.
Q. Had you had any prior in-person meetings with Ms. Sheridan or Mr. Miles to prepare specifically for your deposition today?
A. No.
MS. SHERIDAN: Just for today.

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THE WITNESS: No.

MR. BROOKEY: Q. Had you had any prior phone conversations with Ms. Sheridan or Mr. Miles to prepare specifically for this deposition today?

A. The only other contacts were the continuing updates on whether I'd have a deposition, and these were voice mails. So we were always on different time zones.

Q. Sure. Did you discuss your deposition today, and specifically in preparation for today, with any lawyers other than Ms. Sheridan and Mr. Miles?

A. No.

Q. Have you ever lived in California?

A. Yes.

Q. When?

A. Three months, the summer of 1972.

Q. You haven't lived here since then?

A. No.

Q. Were you in California at any time in 1989?

A. I really don't remember. I mean, I've come to California a number of times, but I don't know whether it was 1989 or not.

Q. Were you in California at any time in 1988?

A. I don't know that either. I don't recall specific years.

Q. Were you in California on April 1st, 1989?

A. I don't know why I would be, but I wouldn't rule it out. I've given talks before at Stanford and

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places like that.

Q. On September 14th, 1999, did you know whether you had been in California at any time in 1989?

MS. SHERIDAN: That's vague and ambiguous. Can you clarify that question?

MR. BROOKEY: Q. Do you understand the question?

A. Did I learn yesterday -- September 14th. That's not yesterday.

Did I learn at some point that I'd been in California on a particular day?

Q. That's correct.

A. No.

Q. Or in a particular year?

A. I don't think it's come up.

Q. Are you familiar with what a Proposition 65 warning sign looks like?

A. Yes.

Q. When is the first time you saw such a sign posted physically on a building?

MS. SHERIDAN: If you recall.

THE WITNESS: I actually don't recall. I remember seeing warning signs posted at gas stations upon returning. I've seen warning signs in bars. But I don't recall when the first time is.

MR. BROOKEY: Q. Was it in 1989?

A. I don't even know if I was here in 1989.

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Q. So you have no idea whether it was in 1989; correct?

MS. SHERIDAN: Argumentative.

THE WITNESS: I have no idea when the last time I've been -- I have no idea whether I was in California in 1989.

MR. BROOKEY: Q. So you don't have any personal knowledge of whether there were any Prop 65 signs posted as of April 1st, 1989; correct?

MS. SHERIDAN: Other than documents he may have reviewed that reported signs being posted in California in April of 1989?

MR. BROOKEY: That wouldn't be personal knowledge.

Q. I mean, you personally are not aware of that; correct?

A. I'm testifying here based on newspaper accounts and the like as opposed to my own experiences.

Q. Oh, okay. You said that one of the items you reviewed was a videotape; is that correct?

A. Yes.

Q. What was on that videotape?

A. A series of antitobacco ads dealing chiefly with environmental tobacco smoke as well as some public service announcements that were more extensive in length, as well as a segment from John Stossel. I believe 20/20 is his show.

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MS. SHERIDAN: Just for the record, Brian, it's the same videotape you have that was lodged with the court.

MR. BROOKEY: Q. Did you view that videotape as part of your meeting yesterday with Ms. Sheridan and Mr. Miles?

A. I had seen the videotape before, but I'm not sure Ms. Sheridan had. So we watched a couple of them, and I'd already seen it, so we didn't watch the whole thing again.

Q. When did you first see that videotape?

A. I don't recall, but it was before I did my declaration sometime.

Q. When did you start working on your declaration?

MS. SHERIDAN: If you recall.

THE WITNESS: In September. I don't know when.

MR. BROOKEY: Q. By that time, had you seen the preliminary injunction motion that was filed in this litigation?

MS. SHERIDAN: Do you mean the entire motion or portions of the declarations from the motion?

MR. BROOKEY: Q. I mean -- that's a fair question -- the memorandum of points and authorities.

A. I don't know what I'd seen. I'd seen a variety of documents produced by plaintiffs in various

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cases for various cities. I'm not sure if these are the same documents you're referring to or not. I just don't know.

Q. Did you review any declarations that were filed by plaintiffs?

A. On behalf of plaintiffs' experts?

Q. By experts on behalf of plaintiffs, yes.

A. Yes.

Q. Which declarations?

A. Dr. Johnson's, a scientist whose name I've forgotten. I forget all the ones I've seen, but I have seen some dealing with the science and the risk issues pertaining to environmental tobacco smoke.

Q. Now, you were asked to critique Dr. Johnson's declaration; is that correct?

MS. SHERIDAN: I would object to the extent that you're asking him anything having to do with the content of his discussions with counsel, consistent with the instruction you gave your experts during their declarations.

So anytime he's asking you a question about any content of any discussion we've had, I would instruct you not to answer.

MS. MYLES: You mean during their depositions?

MS. SHERIDAN: During their depositions.

THE WITNESS: I was asked to prepare a declaration on my views.

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MR. BROOKEY: Q. And did you undertake a critique of Dr. Johnson's declaration as part of the work you were performing in this case?

A. Well, I read his declaration. I said, "Some of these things are just wrong." So I showed up -- I was the one who initiated the complaints or criticism of Dr. Johnson, not them.

Q. You mentioned reviewing a scientist's declaration. If I mention the name Dr. William Nazaroff, does that --

A. That rings a bell.

Q. Okay. Did you undertake a critique of that declaration?

A. I read it, and certainly there were things that were not consistent with my understanding of the literature, but I assume that they were going to designate natural sciences or people in that field to address those issues rather than me.

Q. Because the matters set forth in Dr. Nazaroff's declaration were outside your area of expertise?

MR. KAPLAN: Overbroad.

MS. SHERIDAN: Argumentative.

THE WITNESS: I would distinguish the medical issues from the statistical issues. Dr. Nazaroff is dealing with articles in which people have statistical tests, confidence intervals.

And I teach a course on scientific

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evidence. That's what the whole course is about, how to judge statistical evidence, including segments on the literature dealing with environmental tobacco smoke. So from a statistical standpoint, it's not outside of my expertise, but I am not a doctor.

MR. BROOKEY: Q. So the answer is insofar as Dr. Nazaroff's declaration dealt with nonstatistical matters, it was outside your area of expertise?

MR. KAPLAN: Overbroad.

MS. SHERIDAN: It mischaracterizes his testimony. I'd like to point out that Dr. Nazaroff is not a medical doctor either.

MR. KAPLAN: And unless you want him to go line by line to be able to get an answer to that, since the record should reflect you have not given him a copy of Dr. Nazaroff's deposition at this time --

MS. MYLES: Declaration.

MR. KAPLAN: -- declaration, to indicate whether or not he agrees or disagrees or believes he's an expert to agree or disagree with each individual item that he testified to in his declaration.

MR. BROOKEY: Q. You can answer the question, Dr. Viscusi.

A. I don't want to plead ignorance about all of these issues until I know all the different topics under which you're asking me to claim that I don't know anything.

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Q. Let's pick one, then. You're not an expert in performing exposure assessments, are you?

MR. KAPLAN: Vague.

THE WITNESS: I'm not an expert in taking measurements of exposures, but I do consider myself an expert on translating exposure numbers into risk assessments, which we did for EPA for 200 hazardous waste sites.

MR. BROOKEY: Q. So you are an expert in risk assessments?

A. For hazardous waste sites.

Q. What about for environmental tobacco smoke?

A. If EPA were to give me, here are the dose response relationships that they assume, which is what we did, because you're not allowed to tinker with the official EPA numbers, we can then run with that and turn out expected cases of cancer, which is what we did based on population exposure rates that we estimated.

So I come in at the second stage, where you map populations into stated dose response relationships given to me from the scientific literature. So I don't provide the initial ones.

Q. It's still not clear to me whether you consider yourself an expert in forming risk assessments for environmental tobacco smoke.

MS. MYLES: Objection; asked and answered. It's not a question either. Object to the form of the

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question.

THE WITNESS: It isn't a question.

MS. SHERIDAN: And he has just answered it. Is there a part of his response that you don't understand?

MR. BROOKEY: Yes. I'm trying to find out what the limits of this witness's expertise are, according to him.

Q. Are you or are you not an expert in performing risk assessments with regard to environmental tobacco smoke?

MS. SHERIDAN: Same objections.

THE WITNESS: The process is a big one in terms of a lot of stages, and based on my earlier answer, I consider myself an expert in the latter stages but not on the earlier stages, if that makes it clear.

MR. BROOKEY: Q. Have you reviewed the declaration of Dr. Kelman that was submitted by defendants in this litigation?

A. No, not to the best of my knowledge. It may be one I've seen, but the name doesn't ring a bell.

Q. What about Dr. Levois?

A. Same thing. It doesn't ring a bell.

Q. How many times in the past ten years have you read the front page of a California newspaper?

A. I don't know. I've come to California

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roughly every other year, I would say, over the last ten years, and I usually read papers when I'm here, but I don't know how many times.

Q. How many different newspapers in the state of California have you read in the past ten years?

A. Well, sometimes we used to get material from The Sacramento Bee relating to hazard warnings and treatment for my book Product-Risk Labeling, which was '93. So that would be within the last ten years. And then I'd read the L.A. Times, San Francisco paper.

Q. Now, when you've read the front pages of California newspapers in the past ten years, did you ever see -- do you have any specific memory of ever having seen an article regarding environmental tobacco smoke?

MS. SHERIDAN: And you're limiting your question to the front page of these papers?

MR. BROOKEY: Yes.

THE WITNESS: I don't recall seeing one.

MR. BROOKEY: Q. Do you recall seeing any front-page newspaper articles in the state of California dealing with or referring to Proposition 65?

A. In the past ten years, no.

Q. Do you remember the content of any front-page newspaper article in the state of California you've seen in the past ten years?

A. There was a big earthquake in Taiwan that

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made the papers yesterday, but generally, I don't remember what's on the front page.

Q. Let's go back to the videotape that you viewed that contained certain advertisements. Had you seen any of the items appearing on that videotape in any other form?

MS. MYLES: Objection; vague and ambiguous, overbroad.

THE WITNESS: I don't know whether I'd seen the John Stossel 20/20 show or not, but I had not seen any of the ads.

MR. BROOKEY: Q. Is this the John Stossel show on which a tobacco industry executive appeared to dispute the fact that ETS causes harm?

MR. KAPLAN: Overbroad, assumes facts, vague and ambiguous.

THE WITNESS: I wouldn't characterize it that way. I know he interviewed a tobacco industry official, but I didn't view it as an official that came there just to dispute the evidence.

MR. BROOKEY: Q. How many Proposition 65 environmental tobacco smoke warnings have you seen in the state of California?

MR. KAPLAN: Overbroad, vague and ambiguous.

MS. SHERIDAN: Are you limiting that in time at all?

MR. BROOKEY: Ever.

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THE WITNESS: Well, since arriving here, I saw one at the airport. I've seen them outside your building. Those are the ones I remember. There are other warnings near a bar that I saw.

MR. BROOKEY: Q. As of September 14th, 1999, how many Proposition 65 environmental tobacco smoke warnings had you seen in the state of California?

MS. MYLES: Objection; vague and ambiguous. Do you mean specifically referring to environmental tobacco smoke or general warnings that include statements such as "This building contains chemicals known to the State of California to cause" --

MR. BROOKEY: I'm talking about specific --

MS. MYLES: -- "cancer"?

MR. BROOKEY: -- specific to environmental tobacco smoke or tobacco smoke.

MS. SHERIDAN: And is your question also limited to warnings that he's seen while physically in California?

MR. BROOKEY: That's correct.

THE WITNESS: I remember seeing warnings in bar areas, but I don't know how many warnings I've seen.

MR. BROOKEY: Q. How many of those referred specifically to tobacco smoke or environmental tobacco smoke?

MS. SHERIDAN: If you recall.

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THE WITNESS: I actually don't recall. I noted the fact that there was a warning out, and I said, "Gee, a Proposition 65 warning." I was making note of that. But it's not something I was trying to remember for today.

MR. BROOKEY: Q. Did any of the signs that you saw in bars refer specifically to tobacco smoke or environmental tobacco smoke?

MS. SHERIDAN: Asked and answered.

THE WITNESS: I forget what they said.

MR. BROOKEY: Q. You don't know?

A. I don't remember.

Q. Do you remember seeing the existence of a Prop 65 sign?

A. I remember seeing them in bars. I remember seeing a Prop 65 sign at a gas station when I pulled up for gas, but I don't remember the exact contents of the sign.

Q. How many of the Proposition 65 warning signs you have seen in the state of California, up to and including today, were provided by the tobacco industry?

MR. KAPLAN: Calls for speculation.

MS. MYLES: Lacks foundation, vague and ambiguous.

THE WITNESS: I don't know.

MR. BROOKEY: Q. Have you ever known?

A. I know that they sent lots of them out. I

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know that they worked with trade organizations to send a lot out. I'm not sure who counts for that. When they put the signs up on the entrance of your building, I don't know what role they had specifically with that.

Q. You don't know whether they had any role; correct?

MS. SHERIDAN: Argumentative.

THE WITNESS: That's correct, I don't know if they had a role.

MR. BROOKEY: Q. And you don't have any specific memory of the tobacco industry's sending out any signs, do you?

MS. SHERIDAN: Again, argumentative.

THE WITNESS: Well, the difference between memory and reviewing materials, letters from the Chamber of Commerce, L.A. Times articles that indicates that they did it.

MR. BROOKEY: Q. Right. But you weren't aware of that contemporaneously with it occurring; correct?

MS. SHERIDAN: Relevance.

THE WITNESS: I wasn't here on April 1st and was not tracking on that date.

MR. BROOKEY: Q. So if you were to say the tobacco industry sent out warning signs to chambers of commerce, that would be based on information given to you by other people; correct?

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A. Documents that they compiled, yes.
Q. And those would be documents that you've received in the past year since you were asked to work as an expert in this litigation; correct?
A. Yes.
Q. Okay. And that would be with regard to activity for which you expect to be paid; correct?
MS. SHERIDAN: Argumentative.
MS. MYLES: Also vague and ambiguous.
THE WITNESS: The documents were sent to me as part of my review of the case, and I'll charge them for my time.
MR. BROOKEY: Q. Now, when you saw the Proposition 65 warning in a bar, did that cause you to perform a calculation of the actual risk to your health that was posed?
MS. SHERIDAN: If you recall exactly what you did when you saw a sign on one of these occasions when you noticed a Prop 65 warning in a bar.
THE WITNESS: Well, I wasn't staying in the bar. I was just peeking in. So, I don't go to -- I don't go to bars.
MR. BROOKEY: Q. I read it for the articles.
A. It's true. I didn't -- you know, I just looked in, saw the sign. I did not stay in the bar.
Q. Do you have a specific memory of that occurring? You're describing that as if it's a

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specific incident.

A. No, I do -- well, I specific -- first of all, I generally don't go to bars. So me going to a bar is a rare event in my life. And I -- except for eating or being with people twice in -- I guess it's the Compass Rose Room at the Westin St. Francis, I don't think I've ever been in a bar in the state of California other than to peek in and look at the sign, but not to sort of stay and drink.

Q. Have you ever seen at any time a television ad while you were in the state of California that referred to environmental tobacco smoke?

A. I don't recall seeing one.

MS. SHERIDAN: Do you mean other than a videotape that he reviewed while in the state of California?

MR. BROOKEY: Correct.

MS. SHERIDAN: Because he's testified about that.

MR. BROOKEY: Correct.

THE WITNESS: So I don't recall seeing any.

MR. BROOKEY: Q. Have you ever seen, in the state of California, a billboard dealing with environmental tobacco smoke?

MS. SHERIDAN: Other than things that have already been submitted to the court as far as billboards posted throughout the state?

MR. BROOKEY: No. I'm talking about his

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personal knowledge.

THE WITNESS: I don't recall what I've seen. I didn't see one yesterday.

MR. BROOKEY: Q. You've been told they exist, though; correct?

A. I have copies of the billboards. The State of California claims they exist, the Department of Health Services.

Q. What impact has the existence of these billboards had on Californians' assessment of the risks to their health posed by environmental tobacco smoke?

MS. SHERIDAN: Do you want to limit your question to any time frame?

MR. BROOKEY: No.

MS. SHERIDAN: So you're asking at the present time?

MR. BROOKEY: Ever.

MR. KAPLAN: Overbroad.

MS. MYLES: Could you read back the question, please.

(Record read.)

THE WITNESS: I don't know what impact any specific intervention has had, but the net effect of the current informational environment is that there is substantial awareness of environmental tobacco smoke and California's position that there are potential hazards associated with it.

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MR. BROOKEY: Q. Do you speak Spanish, sir?

A. No.

Q. Do you understand Spanish?

A. No.

Q. Can you read Spanish?

A. No.

Q. Have you ever read Proposition 65?

A. In English, yes.

Q. Have you ever read any of the regulations enacted in connection with Proposition 65?

A. Yes, some of them.

Q. Okay. Which regulations?

A. I believe there's some implementing regulations regarding safe harbor warnings under Proposition 65 that I've read.

Q. Have you ever read the regulations that define what it means to give a, quote, clear and reasonable warning, end quote?

A. I forget which sections I've read recently or not.

Q. Are you aware those regulations exist?

A. That they define what a clear and reasonable warning is?

Q. Yes.

A. I know there's some discussion of that as well as discussion of the objectives of Proposition 65, but I couldn't repeat what a clear and

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reasonable warning is according to the act.

Q. Sure. As part of your expert work, have you been asked to evaluate independently the current state of knowledge of Californians with regard to the hazards posed by environmental tobacco smoke?

MR. KAPLAN: Vague.

MS. SHERIDAN: And again, the same objection from before as to if you're getting at the content of any discussions he had with counsel, I would instruct him not to give you any response about the content of discussions with counsel based on your previous instruction to your witnesses during their depositions.

MS. MYLES: Also object as vague and ambiguous.

THE WITNESS: I don't understand the question.

MR. BROOKEY: Q. Let me put it this way: In preparing your declaration, you did not conduct any independent study of Californians' knowledge of the risks posed by environmental tobacco smoke; correct?

MR. MILES: Vague.

MS. MYLES: Objection; vague.

THE WITNESS: I reviewed these materials, but I didn't undertake any original survey in California.

MR. BROOKEY: Q. Why not?

MS. SHERIDAN: Objection. I don't think

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you're entitled to that information. It potentially calls for discussions he may have had with counsel.

Why don't you ask him -- I mean, it seems like it would be more appropriate if you ask him how he came to prepare his declaration and what he felt was necessary for him to rely on.

MR. BROOKEY: I think I like the question my way. I didn't hear an instruction not to answer.

THE WITNESS: I'm comfortable with the evidence that's in the record and that's stated in my declaration in terms of demonstrating that there is substantial awareness of the environmental tobacco smoke issue in California.

MR. BROOKEY: Q. And does that awareness vary by demographic group?

A. Yes.

Q. Are less educated people less aware of the hazards posed by environmental tobacco smoke?

MR. KAPLAN: Vague.

MS. MYLES: Objection; vague and ambiguous.

THE WITNESS: I don't recall that as being an issue. And we also have to distinguish "Have you heard about environmental tobacco smoke," as opposed to "Do you believe environmental tobacco smoke is risky," which is different.

MR. BROOKEY: Q. Stepping back a way from what you were asked to do or have done in connection with this litigation, have you ever performed any type

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of survey of consumer or -- actually, let me change the question.

Have you ever conducted any survey of Californians with regard to their knowledge of the hazards posed by environmental tobacco smoke?

A. No.

Q. Have you ever read the master settlement agreement?

A. Yes.

Q. You're familiar with its contents?

MR. KAPLAN: Vague.

MS. MYLES: Objection; overbroad.

THE WITNESS: I've read it from start to finish, but whether I could answer -- you know, this is not like -- I didn't study it. I'm not prepared to take an exam on it right now.

MR. BROOKEY: Well, good. I'm not prepared to give you one.

Q. Is that one of the documents you reviewed in preparing for your testimony today?

A. No. It had nothing to do with this case.

Q. I agree. Have you ever --

MS. SHERIDAN: Motion to strike counsel's statement.

MR. BROOKEY: I'll deny your motion, counsel.

Q. Have you ever read the federal Cigarette Labeling and Advertising Act?

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A. I've read the warnings, but I don't know if I've read the whole act.
Q. Have you heard it referred to as FCLAA?
A. Yes.
Q. So if I use that term, you'll understand what I'm saying?
A. Yes.
Q. FCLAA requires surgeon general's warnings to be given with respect to cigarettes in certain circumstances; correct?
A. Yes.
Q. Now, is it fair to say that to not know that smoking is dangerous you would have to have been living in a cave?
MS. SHERIDAN: Objection; vague and ambiguous, argumentative.
MR. MILES: Assumes facts.
THE WITNESS: I would characterize it a little differently, which is that to have not heard that cigarette smoking is dangerous you had to have been living in a cave. And I've actually said that, maybe even written that somewhere.
MR. BROOKEY: Q. So you would characterize the level of awareness of Californians of the dangers of smoking as very high; correct?
MR. KAPLAN: Vague.
THE WITNESS: I think it's true nationally, the "Have you heard that cigarette smoking is

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dangerous to your health," you get close to a hundred percent. I found that in the '97 national survey.

MR. BROOKEY: Q. So does that mean that the warnings that the cigarette industry is required to give under FCLAA serve no purpose?

MS. SHERIDAN: Argumentative.

MS. MYLES: Objection; vague and ambiguous as to time.

THE WITNESS: The warnings cover more than whether cigarette smoking is dangerous. They deal with specific illnesses as well.

MR. BROOKEY: Q. Well, let's just look at lung cancer, because that's -- will you agree with me that lung -- that the link between smoking and lung cancer is one of the issues that is very well known to the public?

A. Yes.

Q. All right. So let's look at that specific issue. Do you believe that the awareness level of the dangers of smoking with regard to an increased risk in lung cancer is so high that continued warnings on that issue as required under FCLAA serve no purpose?

MS. MYLES: Objection; misstates his prior testimony.

THE WITNESS: What do you mean by "purpose"? I mean, they're fulfilling the obligation under the law.

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MR. BROOKEY: Q. Do they serve any other purpose other than strict compliance with the law?

MS. MYLES: Objection; vague and ambiguous, overbroad.

MS. SHERIDAN: I think, also, he's already answered it, Brian. He's already told you that rather than just giving a warning about smoking posing hazards, it specifically identifies certain illnesses. So I think he's already answered your question.

MR. BROOKEY: I don't think that we're talking about why -- I narrowed it for him. We're talking about lung cancer.

Q. So you can answer the question, sir.

A. Well, if we're going to assume that everybody in the population is aware of a particular risk already, then telling them that again is not going to alter that risk perception because they're already there. So if we're assuming people are already where you want them to be, then telling -- you're already where you are is a redundant warning.

Q. So the only purpose would be to comply with the literal terms of the law; correct?

A. If you're assuming --

MS. MYLES: Objection; vague and ambiguous, lacks foundation.

THE WITNESS: If you assume full knowledge going into this, then you don't accomplish anything else by providing a warning.

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MR. BROOKEY: Q. So why does the tobacco industry give the warnings?

MR. KAPLAN: Calls for speculation.

MS. MYLES: Lacks foundation.

MS. SHERIDAN: He's already answered the question several times about complying to the federal requirement.

MR. BROOKEY: Q. You can answer it again.

A. They're legally required to provide the warnings.

Q. And it would be irresponsible of them to unilaterally decide that the warnings would serve no purpose and just stop complying with FCLAA; correct?

MS. SHERIDAN: Argumentative.

MS. MYLES: Objection.

MR. KAPLAN: Calls for speculation, calls for a legal conclusion.

Actually, can I get the question read back. I'm sorry.

(Record read.)

MR. KAPLAN: Withdraw the calls for a legal conclusion objection.

THE WITNESS: They would probably be hit with legal sanctions. Whether that's irresponsible or not is a different issue.

MR. BROOKEY: Q. Would you consider it irresponsible?

MS. MYLES: Objection; vague and ambiguous.

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THE WITNESS: Well, just the same way as I don't like my teenage children to get traffic tickets, even though going 40 miles an hour in a 35-mile-an-hour zone may be safe in that particular area, I would not encourage any client to incur legal sanctions.

MR. BROOKEY: Q. Would you encourage any client to violate the law?

A. No.

Q. Have you ever?

A. Not that I know of.

Q. Does anything in FCLAA that you have read provide an exception based on the level of awareness of the risks described in the FCLAA warnings?

MR. KAPLAN: Calls for a legal conclusion.

MR. MILES: Could you read it back, please.

(Record read.)

MS. SHERIDAN: I would just also point out that the witness has already testified that he's read the FCLAA warnings, but when you asked him earlier, he specifically told you he hadn't read all of FCLAA. So with that caveat.

MR. BROOKEY: That's why I asked him anything that he read.

Q. You can answer the question, sir.

A. Nothing --

MS. MYLES: Objection; lacks foundation.

THE WITNESS: Since I don't recall having

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read it and, if I did read it, it was before 1992 when I wrote my smoking book, I wouldn't recall any specific provisions or exemptions.

MS. SHERIDAN: Would this be a good time to take a break? We've been going about an hour and a half.

MR. BROOKEY: Sure.

(Recess taken.)

MR. BROOKEY: Let's go back on the record.

Q. Dr. Viscusi, let's turn to your curriculum vitae for a few moments. It's attached as an exhibit to your declaration.

I assume that when you were working on your Ph.D., you prepared a dissertation?

A. Yes.

Q. What was the title of that work?

A. "Employment Hazards: An Investigation of Market Performance."

Q. Did that involve tobacco-related issues at all?

A. No. Well, risk perceptions of workers. So the generic structural issues are similar, but smoking did not come up at all.

Q. If you turn to page 2 of your C.V. and you look at the fourth item down after the Kulp awards, "Ranked by Economic Inquiry as the second most prolific economist . . . . ," do you see that?

A. That's correct.

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Q. So that is an award given based on quantity of articles rather than quality?

MS. SHERIDAN: Oh, gosh, argumentative.

THE WITNESS: It's not an award. It's a ranking they did. And they may weight by length of pages. And to the extent that quality enters, they looked at the top 36 economics journals only. So if you published in the No. 37 journal, they didn't have it.

MR. BROOKEY: Q. How many articles were there in these top 36 economics journals during the ranking period?

MR. KAPLAN: Vague, overbroad. You mean that he published or total in the 36 journals?

MR. BROOKEY: Q. I think it's clear, that you published.

A. I didn't know either answer. But we could reconstruct from my C.V., going back, how many articles I published in journals, but I just don't remember the count. I think this was a page-weighted ranking anyway.

Q. Do you have any idea why they found that was an important thing to rank, just the number of pages that had been written?

MS. SHERIDAN: Lack of foundation, calls for speculation.

THE WITNESS: This comes up because department rankings that are often done are done by

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publication in the top journals. So in addition to ranking departments, you want to know who are the superstars that contribute to department rank, so what do individuals contribute to that.

MR. BROOKEY: Q. And you consider yourself a superstar?

MS. SHERIDAN: Objection; lacks foundation, also completely mischaracterizes what he just said.

THE WITNESS: The focus of these things was to try and identify -- sometimes they use baseball terminology. And they're just trying to figure out, to use another baseball term, who are the heavy hitters in terms of articles that contribute to department rankings.

MR. BROOKEY: Q. So when it comes to defending the tobacco industry through written articles, you're Mark McGwire?

MR. KAPLAN: Argumentative.

THE WITNESS: I think I'm more like Nomar Garcia Parra, certainly in terms of build.

MR. BROOKEY: Q. Has anyone written more prolifically than you regarding risk perceptions as they relate to the tobacco industry?

A. No, not that I know of.

Q. If you go three more items down, "Ranked by the Journal of Risk and Insurance (December 1998) as the most productive contributor . . . ," do you see that?

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A. Yes.
Q. That also appears to be dealing with the number of published pages; is that right?
A. They picked out a sample of journals they wanted to do the weights on. And the first sample is the SSCI-indexed journals; the second sample was they weighted journals by quality, impact weighted; then the third ranking was adjusted for coauthorship. And I was first on all three.
Q. Have you ever received an award based on the quality of work you did with respect to risk perceptions and tobacco?
MS. MYLES: Objection; vague and ambiguous, lacks foundation.
THE WITNESS: The Economic Journal piece doesn't deal specifically with tobacco risks, but that's a frequent exhibit in tobacco litigation.
MR. BROOKEY: Q. Which article are you referring to?
A. The Royal Economic Society Prize for 1999, "Alarmist Decisions with Divergent Risk Information." So it deals with a generic problem where there's differing public statements regarding risk beliefs and what happens in terms of how the public interprets it.
Q. So is the answer to my question no, you have never received an award based on the quality of work you did with respect to risk perceptions and tobacco?

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MR. KAPLAN: Asked and answered.
MS. MYLES: Same objections.
THE WITNESS: Well, I don't recall what's in Fatal Tradeoffs. And these various rankings include tobacco work. In the Economic Journal article, I'm not sure if I mentioned cigarettes in there or not, how smokers differ. I'm not sure if it comes up.
MR. BROOKEY: Q. Let's turn to page 4. The very first item, you referred earlier, I believe, to your work for the United States Environmental Protection Agency. Do you see that?
A. Right.
Q. And this indicates that you were a consultant on public smoking restrictions. Do you see that?
A. Yes.
Q. Did that work involve more than simply offering the testimony in connection with the OSHA hearing?
MR. KAPLAN: Argumentative.
THE WITNESS: It was entirely different.
MR. BROOKEY: Q. Oh, okay. So what are you referring to in that item?
A. EPA was preparing an analysis on whether to ban all public smoking. It was an economic analysis. And I was a consultant/expert reviewer for EPA on that.

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Q. What did your work entail?
A. Reviewing, offering suggestions, comments, critiques, what did they leave out, what did they do well, that sort of thing.
Q. Did the EPA pay you for this work?
A. Yes.
Q. How much?
A. I don't recall.
Q. During that time period, were you also receiving money from the tobacco industry?
A. I don't think so.
Q. You don't have any specific memory?
A. My general sense -- and this is only a general sense -- is that there was a long period of time where I did no work other than that one OSHA appearance. So I don't think the OSHA appearance was at the same time.
Q. I realize you don't have a specific memory, but if you were accepting money from the tobacco industry during the time period in which you were consulting with the EPA, you certainly would have disclosed that to the EPA, wouldn't you?
A. In fact, I disclose -- every time there's a Science Advisory Board meeting, I disclose all conflicts of interest, so I would disclose it. But the only activity, as I mentioned, that I did over a broad span of years was the OSHA work. So I don't think there's anything even close.

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Q. And you would have considered it a conflict of interest if you had been taking money from the tobacco industry during the time you were a consulting to the EPA; correct?

A. Certainly.

MS. MYLES: Objection.

THE WITNESS: Unless I've disclosed it.

MR. BROOKEY: Q. As part of your work as a consultant, did you make recommendations to the EPA?

A. I made substantive comments, but not policy recommendations.

Q. The substantive comments dealt with proposed smoking restrictions?

A. Dealing with the economic assessment of the effects of proposed smoking restrictions.

Q. And was that solely in the workplace?

A. No. This is banning all public smoking.

Q. And you thought that was a bad idea; correct?

A. I wasn't commenting whether it was a good idea or a bad idea. That's a policy recommendation. I was commenting on the substantive analysis underlying economic merits of the idea.

Q. And you're not an expert in public policy; correct?

MS. MYLES: Objection; vague and ambiguous.

MS. SHERIDAN: Also argumentative.

THE WITNESS: I also hold the tenured

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appointment in public policy at Harvard.

MR. BROOKEY: Q. Oh, so you are?

A. Well, generally. It depends on what you're talking about. But I have a full professorship at the Kennedy School as well, which is the top public policy school.

Q. So again, you do consider yourself an expert on public policy?

MS. MYLES: Objection; vague and ambiguous.

THE WITNESS: If you're talking about should we do something to the defense budget, probably not. So it depends on the topic.

MR. BROOKEY: Q. What about public policy as it relates to health issues? Are you an expert in that?

MS. MYLES: Objection; vague and ambiguous, overbroad.

THE WITNESS: I think I'm an expert on framing an economic analysis of them, but if you were to quiz me regarding Medicare reimbursement formulas for hospital, institutional knowledge, I don't have all institutional knowledge of all health programs.

MR. BROOKEY: Q. Let's look farther down on page 4. A little more than halfway down there's a reference to the Journal of Risk and Uncertainty. Do you see that?

A. Yes.

Q. What led you to start that journal?

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A. There was emerging literature involving psychology, economics, decision sciences that was spread out over a number of journals, and there was no journal that would pick up this field exclusively.

The publisher discussed it with me and with Mark Machina. They did a survey of the leading researchers in the field and said, "Should there be such a journal?" And they got an enthusiastic response and started the journal.

Q. Did you receive any money from the tobacco industry in connection with the initiation of this journal?

A. No.

Q. Have you at any time received money from the tobacco industry relative to the Journal of Risk and Uncertainty?

A. No.

Q. In 1999, how has the money you have received from the tobacco industry compared to the salary that you have received at Harvard?

MS. SHERIDAN: I'll just object based on relevance.

MS. MYLES: Also object as vague and ambiguous based on his prior testimony.

THE WITNESS: Well, I didn't know how much I'd gotten so far from the tobacco industry. I know I've gotten a couple thousand dollars. I'm not sure if I've gotten more. And I'm paid more than that.

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MR. BROOKEY: Q. What about in 1998?
MS. MYLES: Same objection.
THE WITNESS: I don't know the exact numbers. I know my Harvard salary is bigger.
MR. BROOKEY: Q. Has there ever been a year in which the money you received from the tobacco industry exceeded the amount you received from any other type of employment?
A. It's never exceeded the amount from my regular full-time job, but it could exceed the amount from another consulting engagement.
Q. Have you ever recommended that warnings of the hazards caused by smoking be given by the tobacco industry?
MS. SHERIDAN: Vague and ambiguous, overbroad, not limited in time.
MS. MYLES: Could you read the question back, please.
(Record read.)
MR. MILES: Assumes facts.
THE WITNESS: I have made a recommendation regarding the Premier cigarette and helped design the warning label for that, regarding the fire hazards associated with that cigarette.
MR. BROOKEY: Q. Okay. What about the health hazards?
MR. KAPLAN: Assumes facts.
MS. MYLES: It's vague and ambiguous.

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Object to the form of the question.

THE WITNESS: Other than that one involvement with the Premier cigarette, I've never been a consultant directly to the tobacco industry on anything.

MR. BROOKEY: Q. Have you ever made any recommendations -- and by that, I don't necessarily mean to limit it to direct consulting with the tobacco industry, but to include recommendations in any literature -- that the tobacco industry give warnings with regard to the health hazards of environmental tobacco smoke?

MS. SHERIDAN: Vague and ambiguous.

THE WITNESS: I don't recall making any such recommendations.

MR. BROOKEY: Q. How many times have you testified on behalf of the tobacco industry as a defense expert?

A. In court, once. In deposition, more than that.

Q. How many times in deposition?

A. I don't know the exact number. Probably a half-a-dozen times. I really don't know the case count. I could start using my fingers and try and think of it.

Q. Let me try to limit it and see if that helps. Were any of those times in the state of California?

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MS. SHERIDAN: You're talking about just testimony, either in court or in deposition?

MR. BROOKEY: I'm actually limiting it to deposition testimony.

THE WITNESS: I don't think I've done any California tobacco cases.

MR. BROOKEY: Q. Okay. Have you done any California Prop 65 cases?

A. One.

Q. Which one was that?

MS. SHERIDAN: Asked and answered.

THE WITNESS: It was the one back in the 1980s regarding the 800 number as a mechanism for compliance.

MR. BROOKEY: Q. The Ingredient Commercial Communication case?

A. I guess that's what it's called.

Q. Have you ever read the appellate decision that came out of that case?

A. No.

Q. So you have no idea what that case establishes as far as what it takes to provide a clear and reasonable warning?

MS. SHERIDAN: Argumentative, vague and ambiguous, overbroad.

THE WITNESS: I never read the decision.

MR. BROOKEY: Q. Okay. And do you consider yourself an expert in warnings?

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MS. SHERIDAN: Argumentative.
MR. KAPLAN: Overbroad.
THE WITNESS: I consider myself an expert on how people process warnings information as opposed to every legal decision that's ever been issued on warnings.
MR. BROOKEY: Q. So you don't consider yourself an expert on warnings?
MR. KAPLAN: Argumentative, asked and answered.
MS. SHERIDAN: Misstates his testimony.
THE WITNESS: I'll stick with my earlier answer.
MR. BROOKEY: Q. So you're not an expert on warnings that are given but, rather, the perception of the populace of such warnings; correct?
MS. SHERIDAN: You mischaracterized his testimony to some extent.
MR. KAPLAN: Argumentative.
THE WITNESS: My expertise is on how people process risk information, how to judge the efficacy of warnings from the standpoint of a hazard communication mechanism.
MR. BROOKEY: Q. But not on the appropriateness of any given warning; correct?
MS. MYLES: Objection; vague and ambiguous.
MS. SHERIDAN: He's asked and answered your question several times now.

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THE WITNESS: I view these things as pertaining to appropriateness.

MR. BROOKEY: Q. You don't consider yourself an expert on how to give a proper Proposition 65 warning, do you?

MS. SHERIDAN: Argumentative.

MR. KAPLAN: Vague and ambiguous.

MS. SHERIDAN: Assumes facts.

MR. KAPLAN: Vague and ambiguous.

THE WITNESS: Once again, I do consider myself an expert in risk communication. To the extent that that affects proper warnings, I would be an expert on that.

MR. BROOKEY: Q. Dr. Viscusi, these are very simple questions, and I'm not asking you to be an expert on everything.

MR. KAPLAN: Move to strike comments of counsel.

MR. BROOKEY: Motion denied.

MS. MYLES: You can't deny motions, Brian. The motion is being preserved for the court later.

MR. BROOKEY: Q. Dr. Viscusi, you are not an expert on Proposition 65 warnings, are you?

MS. SHERIDAN: Argumentative, asked and answered, badgering the witness.

MS. MYLES: Vague and ambiguous.

THE WITNESS: There are components for which I claim expertise. That's why I did the

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declaration.

MR. BROOKEY: Q. Now, don't you think a qualified expert on Proposition 65 warnings should know what Proposition 65 requires such warnings to look like?

MS. SHERIDAN: Argumentative. He's already testified that he's seen Proposition 65 warnings and knows what they look like.

MR. MILES: The question is vague, incomplete hypothetical.

MS. MYLES: It also misstates his prior testimony.

THE WITNESS: Either I don't know the answer or I don't understand the question. So why don't you rephrase the question.

MR. BROOKEY: Q. Don't you think that someone who holds himself out as a Proposition 65 warnings expert should have knowledge of what Proposition 65 requires a warning to look like?

MR. MILES: Argumentative, assumes facts, incomplete hypothetical.

MS. MYLES: Misstates his prior testimony. It's also vague and ambiguous.

THE WITNESS: The question also seems to assume that there are specification standards for all possible means of compliance as opposed to simply safe harbor warnings, which I don't think is the case.

MR. BROOKEY: Q. Can you answer the

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question, please?

MS. SHERIDAN: He is answering your question.

THE WITNESS: I did.

MR. BROOKEY: Q. So the answer is no? An expert can give testimony as to whether a warning complies with Proposition 65 without knowing what Proposition 65 requires?

A. No.

Q. Is that your testimony, sir?

A. I'm saying that Proposition 65 doesn't indicate specification standards for all potential means of compliance. That's my understanding of Proposition 65.

Q. But you told me you never read the Ingredient Communications Council case; correct?

MS. SHERIDAN: He said he's read the proposition. I think you're arguing with the witness now. I'd rather you just ask him questions rather than badgering him.

MR. BROOKEY: I think I'm cross-examining the witness, Counsel.

MS. SHERIDAN: You're asking him the same thing over and over again. And he's giving you responses, and when you're not happy with the responses, you keep asking the same questions.

MR. BROOKEY: I think the record will reflect he hasn't answered a single one of my

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questions.

MS. SHERIDAN: Throughout the whole morning?

MR. BROOKEY: Not on this topic.

MS. MYLES: Your question is not clear.

MR. MILES: Is it your comment that he's not told you whether he read the Ingredient Council case? Are you confused about that testimony? Your comment is incredible insulting, and I can't imagine you sat there and didn't hear him cite to you whether or not he had read that case.

Are you suggesting on the record here that you don't know what his answer to your prior question as to whether he had read that case? I would like you to say, did he answer that question before or not?

MR. BROOKEY: Q. Dr. Viscusi, what does Proposition 65 require in terms of the content of a warning?

MS. SHERIDAN: Vague and ambiguous, overbroad.

MR. MILES: Calls for a legal conclusion, lack of foundation.

THE WITNESS: What it does require actually is a legal issue, not an economic issue.

MR. BROOKEY: Q. And a legal issue outside your area of expertise; correct?

MS. SHERIDAN: He's already asked and answered this several times. He's talked about his

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expertise as a warnings expert. So are you asking about warnings within Prop 65?

THE WITNESS: I'm not pronouncing -- making pronouncements regarding legal compliance issues as opposed to whether an adequate message has been conveyed to consumers. And the court can judge whether that is sufficient to comply with the Proposition 65.

MR. BROOKEY: Q. So in preparing your declaration, you were not intending to evaluate whether any of the warnings that defendants claimed they gave actually fulfilled the requirements of Proposition 65; correct?

MS. SHERIDAN: Misstates prior testimony.

THE WITNESS: And I'm not evaluating whether any specific warnings fulfilled the obligations. My task is whether the entire set of information consumers have and have been provided has put them in a position that they are currently informed.

MR. BROOKEY: Q. And is that the entire scope of the expert work you've done so far in this case?

MS. SHERIDAN: Misstates his prior testimony.

MS. MYLES: Overbroad.

THE WITNESS: My declaration covers the scope. So if I left anything out, I'll add anything

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missing from my declaration.

MR. BROOKEY: Q. Dr. Viscusi, are you familiar with what's been characterized as the ghoul defense?

MS. FOE: Could you repeat what -- the ghoul?

MR. BROOKEY: Ghoul, g-h-o-u-l.

MR. MILES: It's argumentative.

THE WITNESS: I've never heard of the ghoul defense.

MR. BROOKEY: Q. You've heard of the defense that the net cost to states or insurance companies from smoking-related illnesses is offset by the convenient fact that smokers tend to have a habit of dying earlier than nonsmokers?

MR. KAPLAN: Argumentative.

MR. BROOKEY: Q. Correct?

A. I wouldn't characterize it that way. I would characterize it as if what you are trying to do is calculate the net financial costs of smoking, then you have to look at the total set of costs, positive and negative. But I'm unaware that the ghoul defense, as you label it, has come up in this case. This is the first time anybody's mentioned it.

Q. Why is Mark Machina no longer an editor of the Journal . . .

MS. SHERIDAN: Objection; relevance.

MR. BROOKEY: I'm looking for the name of

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it.

MS. SHERIDAN: Yeah. And to the extent it involves the privacy rights of Mr. Machina, to the degree that you shouldn't respond to protect his privacy rights, you should keep that in mind as well.

MR. BROOKEY: Let me finish my question, please, since I got interrupted by objections.

Q. Why is Mark Machina no longer an editor of the Journal of Risk and Uncertainty?

MS. SHERIDAN: Same objections.

THE WITNESS: I actually don't want to invade his privacy rights, since it has to do with his own personal health issues, but it had nothing to do with a conflict with me.

MR. BROOKEY: Q. I don't want to invade his privacy rights either. It had nothing to do with any ideological stance?

A. No.

Q. Okay. Does he suffer from any smoking-related diseases?

MS. SHERIDAN: He's already answered the question, and he's not going to answer it further.

MR. MILES: Lacks foundation.

MR. BROOKEY: It's a very general question.

Q. Does he suffer from any smoking-related diseases?

MS. SHERIDAN: He's already said he wants to protect the person's privacy rights, and you're

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stepping on that. So don't ask any more questions about it.

MR. MILES: It's irrelevant.

MR. BROOKEY: Q. Did you fire him?

MS. SHERIDAN: At this point, I mean, the witness has already answered your question and he said that he wants to protect this man's privacy rights.

THE WITNESS: Especially since he's a California resident, so . . .

MR. MILES: This man is an employee that you're referring to in your testimony, has rights as an employee or a former employee to have an employer not disclose information related to employment termination circumstances.

You're asking this witness potentially to violate the former employee's right to privacy, and you're asking him potentially to create a legal problem for the former employer of this man. There's no relevancy for your questions in this lawsuit. The person you're asking about, to my knowledge, has no contact with this case.

Unless you can demonstrate on the record some reason why you're entitled to invade a person's rights of privacy, I think the witness should not answer your question, and I think you should not be asking them.

MR. BROOKEY: Q. Dr. Viscusi, did Mark Machina, prior to leaving his position as an editor of

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the Journal of Risk and Uncertainty, ever express a view as to the dangers caused by smoking?

A. No.

Q. Did he ever express a view as to the dangers caused by secondhand smoke?

MS. MYLES: Objection; lacks foundation, calls for speculation.

THE WITNESS: We've never discussed smoking ever, before or since.

MR. BROOKEY: Q. That's not quite my question. Did he ever express the view -- whether that was in the context of a discussion with you or not, did he ever express the view as to the dangers caused by secondhand smoke?

MS. SHERIDAN: His answer did address your question.

MR. BROOKEY: The answer was "We've never discussed smoking . . . ." If Mr. Machina expressed a view by way of a publication that was never discussed with the witness, his answer was not responsive.

MS. MYLES: Objection; lacks foundation, calls for speculation.

THE WITNESS: I don't know of any publication where he's ever written about smoking.

MR. BROOKEY: Q. Is there any context at all in which Mr. Machina ever expressed a view to you regarding -- I'm sorry. Let me take out the "to you."

MS. MYLES: Take it out. It lacks

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foundation.

MR. BROOKEY: Q. Is there any context at all in which Mr. Machina ever expressed a view regarding the dangers caused by secondhand smoke?

MR. KAPLAN: Lacks foundation, calls for speculation.

MR. MILES: And it's hearsay if the communication is disclosed.

THE WITNESS: I know of no contacts where Professor Machina has discussed smoking.

MR. BROOKEY: Q. No context?

A. That's correct.

Q. Okay. I wanted to make sure I heard you correctly.

Has Mr. Machina ever taken a position in any context adverse to the tobacco industry?

MS. SHERIDAN: Lacks foundation, calls for speculation.

MS. MYLES: Also vague and ambiguous.

THE WITNESS: I don't know what he's done. I have no personal knowledge that he's ever done this.

MR. BROOKEY: Q. Where does he currently live?

A. La Jolla or San Diego.

Q. Do you know his address?

MS. SHERIDAN: Again, that may call for the privacy rights of this witness, protecting the privacy rights of Mr. Machina, and I think he's already stated

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that he doesn't want to do that.

THE WITNESS: I don't know his home address, no.

MR. BROOKEY: Q. Is he currently employed?

A. Yes.

Q. Where?

A. UCSD.

Q. In what department?

A. Economics.

Q. I don't know if UCSD distinguishes. Is he in the postgraduate department or undergraduate, or do you know?

A. He teaches both.

Q. Now, how many papers or articles have you published that are critical of the tobacco industry?

MR. KAPLAN: Vague, ambiguous.

THE WITNESS: I can't recall ever publishing an article either praising or being critical of them. I'm evaluating economic merits.

MR. BROOKEY: Q. Haven't you characterized the tobacco companies as having an unblemished record of success in litigation?

MS. SHERIDAN: Objection; lacks any context as far as time frame.

MR. KAPLAN: Could I get the question read back, please. I'm sorry.

(Record read.)

MS. MYLES: Objection; argumentative, and

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to the extent it's intended as cross-examination on the last question, it misstates or mischaracterizes the answer to his last question.

THE WITNESS: To the extent that I've discussed that, it was referring to the fact that at the time when I was writing, they had yet to lose a case.

MR. BROOKEY: Q. And you had no value judgment by using the word "unblemished" or expressing whether that was a good thing or a bad thing?

A. No, that's not a value judgment. It just simply says they hadn't lost. Unblemished means they had nothing in the loss column.

Q. And you've equated tort damage awards to smokers with lottery winnings, haven't you?

MR. KAPLAN: I'm sorry. With what, Brian?

MR. BROOKEY: With lottery winnings.

THE WITNESS: I think there are a lot of lotteries that have been going on with respect to these, but yes, if you can get a multimillion dollar payoff, that would be like a lottery payoff.

MR. BROOKEY: Q. And you haven't expressed any opinions regarding the impact on those, quote, lottery, end quote, recipients of the fact that they contracted fatal diseases; correct?

MR. KAPLAN: Argumentative.

MS. SHERIDAN: Vague and ambiguous.

MS. MYLES: Assumes facts not in evidence.

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THE WITNESS: I've talked about smoking-related diseases in my papers.

MR. BROOKEY: Q. How many of your papers discuss the people suffering from such diseases with any amount of compassion?

MR. MILES: It's argumentative.

MR. KAPLAN: Vague, ambiguous.

THE WITNESS: I would say all my writings deal with the economic issues as opposed to writing novels or pieces for the trade press.

MR. BROOKEY: Q. Let's talk about the time you testified at trial. Which trial was that?

A. The Ohio Ironworkers Union case.

Q. When did you testify there?

A. Sometime in the past year, so it was either early in 1999 or late in 1998. I don't know when.

Q. What was the subject matter of your testimony?

A. Risk awareness.

Q. What risks were the subject matter of your testimony?

A. The hazards associated with cigarette smoke.

Q. Primary smoke?

A. Primary smoke.

Q. So that case had nothing to do with environmental tobacco smoke, at least insofar as your testimony was concerned?

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A. I don't think it did, as far as I know.
Q. Are you familiar with a Dr. Berman?
A. Do you have a first name?
Q. Not one that I'm aware of. I'm sure he does.
A. I don't recall. I may have come across the name.
Q. Now, you were originally asked to provide testimony during the Minnesota lawsuit; correct?
A. I've done depositions for a number of these state attorney general suits.
Q. And you were originally asked to provide testimony at trial during the Minnesota lawsuit; correct?
MS. SHERIDAN: Vague and ambiguous.
THE WITNESS: I never testified at trial. Nobody said, "Would you please walk in tomorrow morning and testify."
MR. BROOKEY: Q. No, because first there was a challenge to the appropriateness of your testimony; correct?
MS. SHERIDAN: Argumentative.
THE WITNESS: I'm not aware of that.
MR. BROOKEY: Q. You're not aware of a challenge to your testimony as cumulative of another expert?
A. As what?
Q. Cumulative.

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A. Cumulative?
Q. Yes.
A. No.
Q. You're not aware of any motion that was filed to exclude your testimony under the federal rules of evidence?
A. No.
Q. You're not aware that the tobacco industry withdrew you as an expert -- testifying expert in that case?
MS. MYLES: Objection; assumes facts not in evidence.
THE WITNESS: I know I didn't testify.
MR. BROOKEY: Q. And no one communicated to you the reason why you weren't testifying at trial?
MS. SHERIDAN: He's asked and answered the question, Brian.
THE WITNESS: I wasn't aware of any of the things you just discussed.
MR. BROOKEY: Q. Are you aware of any other situation in which you originally planned to offer testimony on behalf of the tobacco industry and ultimately your testimony was not used?
MS. SHERIDAN: And I would just caution you, to the extent you were a consultant on a case in which you were not formally disclosed as an expert, you're not required to answer a question to that extent. So only for cases in which you were actually

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formally disclosed as an expert.

THE WITNESS: I'm not aware of any cases that went to trial and where the trial was completed where I was named as an expert, since none of the attorney generals cases were completed, I think, except for Minnesota.

MR. BROOKEY: Q. Well, when you say the trial was completed, you mean to go all the way through and end up with a verdict or a judgment?

A. Right.

Q. So what about trials that were not completed? Were you named as an expert in any of those types of cases?

A. I may have been in some of these states, since I was deposed in a lot of states; but I'm not sure in which ones I was going to testify, which ones I wasn't. Typically, the number of witnesses is limited, and these decisions were being made at the last minute.

Q. Are you the leading expert in the country on risk perceptions as they relate to tobacco?

MS. MYLES: Objection; vague and ambiguous, lacks foundation.

THE WITNESS: I'm not sure that self-congratulatory answers are going to do me that much good. Other people have published in the area. I know of nobody else who's done work on risk perceptions using what I would call valid quantitative

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metrics for risk perceptions.

MR. BROOKEY: Q. What do you call valid quantitative metrics for risk perceptions?

A. So, for example, I've done work asking people "Out of 100 smokers, how many of them do you think will die because of illnesses related to smoking behavior?" That's a well-defined metric.

Whereas if you ask people "Is smoking very risky," that's not a well-defined metric because you don't know what's going through people's heads when you say "very risky."

Q. Well, you have characterized smoking as risky, haven't you?

A. I believe cigarette smoking does pose potential risks to the smokers.

Q. And you've characterized it as risky; correct? I don't want to trick you. The name of your book is Smoking: Making the Risky Decision; correct?

A. So, risky in the sense that I just said, yes.

Q. And what's going through your head when you say "risky"?

MS. SHERIDAN: In titling his book?

THE WITNESS: That involves some probability of adverse health outcomes associated with smoking.

MR. MILES: Probability or possibility?

MS. SHERIDAN: Probability, I think.

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THE WITNESS: Probability can be zero as well. So it involves a probability.

MR. MILES: All right. Thank you.

MR. BROOKEY: Q. And you have characterized risks associated with smoking as substantial, haven't you?

A. Where I was taking the surgeon general's evidence at face value and not questioning.

Q. And you don't have any expertise sufficient to attack the attorney general's scientific evidence, do you?

A. The surgeon general or the attorney general? Did you say surgeon or attorney?

Q. Oh, I'm sorry. The attorney general.

A. The attorney general, I don't know if the attorney general knows much.

Q. Not as much as you?

MS. SHERIDAN: Argumentative. He was earlier speaking about the surgeon general, and you started talking about --

MR. KAPLAN: Are you asking what Janet Reno knows?

THE WITNESS: Yes. I don't think Janet Reno knows that much about smoking.

MR. MILES: Except arguably in Waco.

MR. BROOKEY: I'm so glad I restrained myself and let him do that.

Q. Dr. Viscusi, who are the other experts in

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the United States on risk perceptions as they relate to smoking?

A. I know of nobody else who I would recognize as an expert on this topic.

Q. If you had a conflict of interest and for some reason could actually not give testimony on behalf of the tobacco industry with regard to risk perceptions and cigarette smoke, who would you refer the tobacco industry to as an alternative expert?

MR. KAPLAN: Argumentative as phrased.

MR. MILES: Calls for speculation.

MS. SHERIDAN: It also lacks foundation based on his earlier testimony.

MS. MYLES: And vague and ambiguous as to the term "conflict of interest."

THE WITNESS: Well, there are people in Spain who've done smoking-related work.

MR. BROOKEY: Q. Who are they?

A. Fernando Antonas. I don't know the last name very well, but I do know the first name.

So that would be the best group in terms of actual people who've done research as opposed to people who would read my articles and then testify.

Q. And they've done research on risk perceptions of Californians with regard to cigarette smoke?

A. They've done work on people in Spain.

Q. And you haven't done work on people in

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California, have you, their risk perceptions regarding the dangers of cigarette smoke?

MS. SHERIDAN: You mean independent surveys?

MR. BROOKEY: Yes, specific to California.

THE WITNESS: They're part of the national sample, which we could break out. So I've broken out some states, but I did not break out California for this.

MR. BROOKEY: Q. And you consider -- do you consider yourself -- I'm sorry -- the leading expert in the country on risk perceptions with regard to secondhand or environmental tobacco smoke?

MR. KAPLAN: Asked and answered.

THE WITNESS: I don't know what everybody else has done. So I'd have to see what they had done in this area before I pronounce myself the leading expert.

MR. BROOKEY: Q. And it's fair to say the body of literature with regard to this element of risk perception is not as vast as the body of literature regarding risk perceptions of smoking; is that correct?

A. That's --

MS. SHERIDAN: Literature that he's authored or others?

MR. BROOKEY: That exists.

MS. MYLES: Lacks foundation.

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THE WITNESS: The economics literature, certainly there's less of it, but I'm not sure about the popular press.

MR. BROOKEY: Q. Well, again, when you have been talking risk perception, you've been talking about the economic aspect, haven't you?

A. Some of the publications in the smoking area are by psychologists and people at public health schools, for example.

Q. Do you consider yourself the leading expert in the country with regard to risk perceptions of Californians relating to the dangers of secondhand or environmental tobacco smoke?

MS. MYLES: Objection; vague and ambiguous.

THE WITNESS: I would want to see who all the other experts were and what they've done before I declare myself the leading expert.

MR. BROOKEY: Q. Are you aware of anyone who studied such risk perceptions specific to California?

MS. SHERIDAN: Specifically to secondhand smoke issues?

MR. BROOKEY: Yes.

THE WITNESS: Not that I know of.

MR. BROOKEY: Q. You've characterized yourself in the past as someone who has served as an expert on a wide range of smoking issues for defense law firms; correct?

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A. I may have said that. I don't know.
Q. I just want to get a feel for what type of smoking issues you've talked about. We've mentioned, I think, a couple of them, risk perceptions relating to cigarette smoke -- or I'm sorry -- smoking and risk perceptions with regard to secondhand smoke. Are there other smoking-related issues on which you have served as an expert?
MS. SHERIDAN: And just to recall my previous admonition, cases where you may have been a consultant but were never formally disclosed as an expert you're not required to tell him about.
THE WITNESS: I know I've done work on how you can conceptualize the financial costs of smoking, so that generic class of issues, as opposed to presenting the specific numbers. So that would be the economic aspect, the risk perception aspect. And that's risk perception for a variety of different age groups, including young people. So I've done work on that as well.
Addiction, so I was involved in addiction cases.
MR. BROOKEY: Q. Now, with your background, you weren't giving testimony, were you, on whether nicotine was addictive? Correct?
A. Well, that has an economic meaning too. So I was giving testimony on the economic properties of cigarette smoking.

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Q. As they relate to addiction?
A. Yes.
Q. Did part of that testimony include the fact that making a product addictive is going to increase the demand for that product and give the manufacturer an economic benefit?
MR. MILES: Assumes facts and it's argumentative.
THE WITNESS: No. Mostly it was analyzing the properties of decisions by smokers, price responsiveness in the short run and long run, things of that nature.
MR. BROOKEY: Q. How does addiction enter into that analysis?
A. Well, if your view of addiction is that people are trapped in the smoking behavior and cannot alter it, that they're locked in for life, then they presumably should not respond to price changes in terms of the quantity of cigarettes smoked.
And not only does the propensity of people to take up smoking respond to prices, but also so, too, does the number of cigarettes people smoke.
Q. Is it fair to say that in evaluating the credibility of an expert witness, it's important to consider whether that expert has testified for both plaintiffs and defendants?
MS. SHERIDAN: Argumentative, lacks foundation.

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MR. KAPLAN: Calls for speculation.
THE WITNESS: That's also a legal judgment. It's a legal judgment, not economics.
MR. BROOKEY: Q. Well, how many times have you served as an expert, sum total, in the last five years?
A. I don't know.
Q. Hundreds?
A. No.
Q. Dozens?
A. Dozens over my life. I don't keep tabs what happened in the last five years.
Q. So you have a sense of evaluating the credibility of experts; correct?
MS. MYLES: Objection. That misstates his testimony.
THE WITNESS: I just said I've testified.
MR. BROOKEY: Q. Okay. Do you have an opinion as to whether an expert is more or less credible if that expert has testified exclusively for plaintiffs, for instance, rather than for defendants?
MS. SHERIDAN: Asked and answered.
MR. MILES: Incomplete hypothetical, calls for speculation, it's argumentative, lack of foundation.
THE WITNESS: I think credibility depends on the merits of the testimony and the nature of the expertise. If you only have testified twice and they

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were both for plaintiffs, that doesn't necessarily mean you're not credible.

MR. BROOKEY: Q. What if you've testified dozen of times and it was only for plaintiffs?

MS. SHERIDAN: Argumentative.

MR. BROOKEY: Q. Does that undercut credibility?

MR. MILES: Same objections.

THE WITNESS: Once again, I'd value the testimony based upon the merits of the testimony.

MR. BROOKEY: Q. Has your testimony ever been challenged on the grounds of bias?

A. Not that I know of.

Q. You've never been cross-examined as to your interests on behalf of the tobacco industry?

MS. MYLES: Objection; vague and ambiguous. And are you excluding today?

MS. SHERIDAN: Yeah, because when you say "challenged," you imply that has to do with a court ruling and then, in the second breath say, "Have you ever been cross-examined?" I imagine in every deposition plaintiffs attorneys try to do what you're trying do. Is that what you're asking?

MR. BROOKEY: I think the question is clear.

Q. Do you understand the question?

A. I'm not sure what you're referring to, because as I indicated, I didn't think there were any

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court challenges.

Q. Are you aware of any instance in which you were disqualified as an expert?

MR. MILES: Assumes facts.

THE WITNESS: I've never been offered for testimony at trial and not been permitted to testify, if that's what you mean.

MR. BROOKEY: Q. You're sure of that?

MS. SHERIDAN: He's answered your question, Brian.

THE WITNESS: I've never had to go home, where I was told that I was disqualified.

MR. BROOKEY: Q. All right. Now, you mentioned before your testimony with regard to OSHA. I think there was a notice of proposed rule making relating to secondhand smoke; correct?

A. That's correct.

Q. Have you testified at any other time before any governmental agency?

A. FTC. That's it.

Q. When --

A. I've testified on other occasions, but not related to smoking.

Q. Okay. So the FTC was related to smoking?

A. Yes.

Q. When did you testify before the FTC?

A. Well, it was in deposition. I would say it was last year, conceivably the year before, but my

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best recollection is that it was a year ago.
Q. And you testified as an expert witness?
A. Yes.
Q. On risk perceptions?
A. Yes.
Q. With regard to secondhand smoke?
A. No.
Q. Primary --
A. Primary smoke.
Q. And who hired you as an expert in that case?
A. It was a law firm out of D.C. I forget the law firm.
Q. Which tobacco companies, if any, were you giving testimony on behalf of?
MS. SHERIDAN: Lacks foundation.
THE WITNESS: I believe the law firm was retained by R.J. Reynolds.
MR. BROOKEY: Q. Was that in connection with litigation that had been instituted by the FTC?
MS. MYLES: Objection; lacks foundation.
THE WITNESS: I don't think I would characterize it as litigation. It may have been an administrative action.
MR. BROOKEY: Q. Was that the administrative action relating to the Joe Camel advertising campaign?
A. It was related to Joe Camel. I'm not sure

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which aspect of Joe Camel it was, the ad or his existence.

Q. What was the subject matter of your deposition? Can you give me more detail than just the general you testified as to risk perceptions of primary smoke?

MS. MYLES: Objection; overbroad, best evidence.

THE WITNESS: I don't recall all of my testimony, since I think the deposition was two days long. But generally, I presented my results on young people as well as older age groups.

MR. BROOKEY: Q. Did you testify as to the impact of tobacco industry advertising to young people on those young people's perceptions of risk?

MS. SHERIDAN: Vague and ambiguous.

THE WITNESS: My testimony was on their risk perceptions, not on Joe Camel specifically, just where did their risk perceptions end up.

MR. BROOKEY: Q. Now, you appear from time to time in the media, don't you?

A. Yes.

Q. Speaking on behalf of the tobacco industry?

A. No.

Q. You, I understand, needed to cancel a television appearance in order to give testimony today.

A. This was a -- well, I have discussed

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cigarette smoking with the media, but never as an official spokesperson of the tobacco industry and without their knowledge.

But the media thing was a media session relating to a public appearance I'm doing before the media in New York that has nothing to do with cigarette smoking.

Q. What does it have to do with?

A. Corporate risk decisions.

Q. Have you ever appeared on television discussing the dangers of secondhand smoke?

MS. MYLES: Objection; vague and ambiguous.

THE WITNESS: I don't think any of my TV appearances have dealt with secondhand smoke. I think there have only been a couple on the CBS Evening News and ABC, of the national networks.

MR. BROOKEY: Q. All right.

A. It may have come up in a longer show that I did on Public Broadcasting.

Q. All right. Let's look at the CBS Evening News. What did you discuss when you appeared on the CBS Evening News?

A. Same things for ABC, 20/20. It was the financial cost issue.

Q. The ghoul defense?

MR. MILES: Argumentative.

THE WITNESS: I don't view it as the ghoul defense. I view this as the only legitimate way to

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count costs.

MR. BROOKEY: Q. Oh, okay. Does anyone else believe that other than you?

MR. KAPLAN: Calls for speculation.

MS. MYLES: Lacks foundation.

MR. MILES: And argumentative.

THE WITNESS: Every published account by Ph.D.s that I've seen agrees with me. I'll give you a series of them.

MR. BROOKEY: Q. That's okay. Have you intentionally not reviewed published reports that contradict that view?

A. Well, there will be briefs on behalf of the states that take a different view, but these are not published in the economics literature.

Q. When you appeared on television, did you disclose your ties to the tobacco industry?

MS. MYLES: Objection; vague and ambiguous as to the term "ties to the tobacco industry," assumes facts not in evidence.

THE WITNESS: In each case, I indicated to the editors before we did any taping that I testified on behalf of the tobacco industry in litigation.

MR. BROOKEY: Q. I believe you said that when you appear in the media, you do it without the knowledge of the tobacco industry; is that correct?

A. I don't call them up and say, "I'm going to do a segment relating to smoking."

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Q. But if you were going to do a segment relating to smoking in which you planned to say something contrary to tobacco industry interests, you would call them, wouldn't you?

A. No.

MS. SHERIDAN: Lacks foundation, calls for speculation.

MS. MYLES: Also vague and ambiguous as to the term "contrary to tobacco industry interests."

THE WITNESS: I wouldn't call them and tell them, regardless. I would not seek their approval.

MR. BROOKEY: Q. One of the books -- and I think you referred to this earlier -- is called Product Risk Labeling: A Federal Responsibility?

A. Yes.

Q. And in that book you criticize Proposition 65, correct?

A. Yes.

Q. What motivated you to write that book?

MS. MYLES: Objection; vague and ambiguous.

THE WITNESS: I'd done work on it before and published on it before. And the American Enterprise Institute wanted to know if I wanted to write a book about federalism, state versus federal responsibilities, so I picked that topic.

MR. BROOKEY: Q. And you took a position against state-by-state regulation; correct?

A. In favor of federal regulation.

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Q. In favor of federal regulations that would require warnings of the hazards of cigarette smoking?

MS. SHERIDAN: Misstates his previous testimony, lacks foundation.

MS. MYLES: Vague and ambiguous.

THE WITNESS: This book dealt generally with product risks broadly. So this is not a book about cigarettes per se.

MR. BROOKEY: Q. Cigarettes are mentioned in the book, though; correct?

A. I have no idea what I wrote in -- whether I mentioned cigarettes specifically or not.

Q. Or smoking?

A. Well, I'm sure I had to mention smoking with respect to how people rated the safe harbor Proposition 65 warning relative to cigarette risks, but it was not a book about cigarettes.

Q. At the time you wrote this book, there were several states that were considering enacting laws similar to or based on Proposition 65; correct?

A. Yes.

Q. And you discussed those proposals in your book as well?

A. I listed them and discussed, to some extent, some of those proposals.

Q. And you expressed a view as to whether as a matter of policy, those states should enact such laws?

A. I'm not sure if I reviewed every specific

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one, but my general view is that if there's to be a law, we should do it federally.

Q. So that attribute would be an example in favor of having federal regulation rather than having one state at a time enact its own laws?

A. Right.

Q. Do you know how many, if any, of those eight other states ultimately adopted laws that were similar to Proposition 65?

A. I didn't follow the aftermath.

Q. Were you involved in any way in the campaign or campaigns to defeat such laws from being passed?

MS. SHERIDAN: Lacks foundation, calls for speculation.

MS. MYLES: Also vague and ambiguous.

THE WITNESS: I don't know in any way. I don't know if my work was cited in these campaigns.

MR. BROOKEY: Q. You weren't actively involved?

A. I made no public appearances, took no money as a consultant, and did nothing that I'm aware of either for or against any of these proposals.

Q. In your opinion, Dr. Viscusi, in terms of conveying both a risk and the significance of that risk, is a specific warning better than a general warning?

MS. SHERIDAN: Vague and ambiguous.

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MR. KAPLAN: Overbroad.

MS. MYLES: Incomplete hypothetical.

THE WITNESS: I don't know what you mean by a specific versus a general warning.

MR. BROOKEY: Q. Does the efficacy of a warning message increase proportionately to the amount of relevant information contained in that warning?

MS. MYLES: Objection; vague and ambiguous and incomplete hypothetical, calls for speculation, lacks foundation.

THE WITNESS: The answer is probably no, because the problems of information overload.

MR. BROOKEY: Q. Is it fair to say there's a spectrum between too little information and too much, then, in terms of designing an effective warning?

MS. MYLES: Same objections.

THE WITNESS: There is always an issue as to how much information you want to provide, and it depends not only on the warning itself but how much consumers know already and how they can process the information.

MR. BROOKEY: Q. Assuming a blank slate in terms of public knowledge and looking at the FCLAA warnings, is it fair to say that a warning that says "Warning: Smoking is Bad" is not as effective in conveying a risk message as is the warning "Smoking Causes Lung Cancer"?

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MR. MILES: Assumes facts.
MR. KAPLAN: Incomplete hypothetical.
THE WITNESS: And also, it assumes how people are going to process it.
MR. BROOKEY: Q. Can you answer the question, though?
MS. SHERIDAN: He is answering your question.
THE WITNESS: I've never tested the warning language "Smoking Is Bad," so I don't know what people -- goes through people's heads when they see that. And they've already heard the lung cancer -- I know you're going to assume a blank slate, but as it turns out, it was not a blank slate in the real world. So it's a question of what you're adding to knowledge in either case.
MR. BROOKEY: Q. But again, assuming a blank slate, is "Smoking Is Bad" as effective a warning at conveying the risk of smoking as is the warning "Smoking Causes Lung Cancer"?
MS. MYLES: Calls for speculation, assumes facts not in evidence.
MR. MILES: Assumes facts contrary to evidence.
MS. MYLES: And incomplete hypothetical. And the witness has already answered the question.
THE WITNESS: This is something we've gone through, exactly this, before. So I'd like to repeat

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my earlier answer. It's exactly the same question.

MR. BROOKEY: Q. Well, I think you didn't follow my assumption that there's a blank slate.

MS. MYLES: That's why it calls for speculation. The witness said he could not ignore that fact; therefore, he wasn't able to answer the question as phrased by you.

MR. BROOKEY: Q. So you can't answer that question?

A. People are going to interpret information within the context of what they've already got. And it's just a very strange world you're asking me to assume where people are starting off with zero risk beliefs regarding smoking. Even pre-1964 or even a century ago, there was a belief in the risks of smoking.

Q. So you're saying that you cannot say that as a general principle, that a specific warning that specifically conveys what a risk is is better than a generic warning that there is a risk; is that true?

MS. SHERIDAN: Asked and answered.

MR. MILES: Incomplete hypothetical, calls for speculation.

MS. MYLES: Misstates his prior testimony.

THE WITNESS: It is true that it is not a theorem that more specificity is always better. That's true. It just doesn't work that way.

MR. BROOKEY: Q. But there are some

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circumstances where it is true; correct?

MR. MILES: Same objections.

THE WITNESS: Specificity is not always bad.

MR. BROOKEY: Q. And lack of specificity sometimes is; correct?

A. It could go either way. Specificity sometimes is good, sometimes is bad.

Q. And sometimes generality is bad; correct?

A. Sometimes it's good, both.

Q. And sometimes it's bad; correct?

MS. MYLES: He's answered that question.

THE WITNESS: Sometimes generality helps make the warning more effective. Sometimes it may make it less effective. Depends on the context in which you're trying to convey and what you're talking about by more general.

MR. BROOKEY: Q. Well, let's pose a hypothetical. Let's say this deposition is finally concluded and it's time for you to go home. And there --

MS. SHERIDAN: I like that hypothetical so far, by the way. Thank you.

MR. BROOKEY: Q. There is a gaping hole that is covered by a thin mesh, and you can't see the hole, immediately across the threshold of the exit to this building. All right?

Is a warning "Be careful when you leave" as

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effective in conveying to you the level of risk as a warning "Be careful, there's a gaping hole immediately outside the door"?

MR. MILES: Incomplete hypothetical, calls for speculation.

MS. MYLES: Argumentative.

THE WITNESS: Well, to the extent that you're conveying a warning that indicates a specific precaution that could be undertaken there as opposed to looking up, sideways or down, in that instance I'd rather be told of the hole, I think.

MR. BROOKEY: Q. And by the way, just let me make it clear that was a hypothetical.

A. Good. We'll see at lunch.

Q. Let's go back to the work you were asked to do in this case. You weren't actually asked to design a Proposition 65 warning campaign for the defendants; correct?

MS. SHERIDAN: Same objections I've made before. To the extent you're asking about the content of any discussions he has had with counsel, consistent with your instruction to your experts, I'll ask him not to answer anything.

MR. BROOKEY: That's actually neither consistent with my instructions nor with the code.

MS. SHERIDAN: That's what you instructed your witnesses.

MR. BROOKEY: Q. You were not asked to

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prepare or to design a warning -- Proposition 65 warning program; correct?

MS. SHERIDAN: Same objection.

THE WITNESS: I'll pass, since I've been instructed not to answer.

MR. BROOKEY: Q. You did not prepare a proposed Proposition 65 warning program on behalf of defendants, did you?

A. No.

Q. Do you anticipate that you will during this litigation?

MS. SHERIDAN: Calls for speculation.

THE WITNESS: I don't know what I'll be called on to do.

MR. BROOKEY: Q. You have no idea?

MR. KAPLAN: Asked and answered.

MR. BROOKEY: Let me withdraw that, because you have no idea what you'll be called on to do.

Q. What do you expect to do further in this work as an expert witness?

MS. SHERIDAN: Lacks foundation.

MS. MYLES: And subject to the instruction that counsel gave earlier regarding discussions with counsel.

THE WITNESS: For all I know, you could drop the case later this week. And so I don't have an independent agenda that I'm pursuing here.

MR. BROOKEY: Q. But you don't have any

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expectation of actually coming up with a proposed Proposition 65 warning program for the defendants; correct?

MS. SHERIDAN: Asked and answered.

MS. MYLES: Objection; lacks foundation, calls for speculation.

THE WITNESS: I don't know what the future will bring in that regard.

MR. BROOKEY: Q. And you don't think one is necessary to you?

MS. SHERIDAN: Objection; misstates his previous testimony, mischaracterizes his earlier responses.

MS. MYLES: Vague and ambiguous.

THE WITNESS: I think the citizens of California are already informed.

MR. BROOKEY: Q. And did anyone tell you that the existing state of public knowledge has been established in this lawsuit as something that is not a valid defense to Proposition 65?

MR. MILES: Assumes facts.

MR. BROOKEY: It does not assume facts, Mr. Miles.

MS. MYLES: It mischaracterizes the court's ruling to the extent it's intended to refer to that.

MR. MILES: And, Counsel, a telephonic ruling that has not yet been subject to a hearing at the trial court level does not establish a proposition

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in a lawsuit. Your statement suggesting the contrary is inappropriate on your part.

MR. BROOKEY: You can answer the question, Dr. Viscusi.

MS. MYLES: Could you have the question read back, please.

MR. BROOKEY: Sure.

(Record read.)

MS. SHERIDAN: Again, I think it's fair that you can exclude any discussions you had with counsel. So has anyone else told you that, would be the question.

THE WITNESS: Nobody else has told me that.

MR. BROOKEY: Q. That wouldn't have any impact on your analysis as set forth in your declaration, would it?

MR. MILES: What --

MS. MYLES: Objection; vague and ambiguous, calls for speculation.

MR. MILES: And assumes facts.

THE WITNESS: My analysis is prepared with respect to whether there's a rationale for warnings and whether people have been given the warning message as opposed to how the courts are going to rule on particular matters.

MR. BROOKEY: Q. Now, when you were asked to serve as an expert witness in this case, were you asked to provide a specific opinion?

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A. No.
Q. Were you asked to draw a specific conclusion?
MS. SHERIDAN: Hang on just a second. The same objections regarding any discussions he had with counsel. I think he's asked -- you've asked this question many different times throughout the deposition, and he's answered it for you.
THE WITNESS: Let me make it simple. They said, "Go write a declaration." They told me nothing about what was in it.
MR. BROOKEY: Q. Because they knew what you would say. You've published extensively.
I'll withdraw that.
MR. MILES: Counsel, that's argumentative.
MR. BROOKEY: I'll withdraw that.
Q. It would be inappropriate for someone to come to you and say, "We want you to" -- "We want to hire you as an expert witness, and this is the conclusion we want you to come up with"; correct?
MR. MILES: Calls for a legal conclusion, lack of foundation, incomplete hypothetical, calls for speculation and it's argumentative.
MS. MYLES: It's also vague and ambiguous as to the term "inappropriate."
THE WITNESS: You know, I'm not here to judge what's appropriate or not. Dr. Johnson had his

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entire declaration written by lawyers, and he just put his name to it. So that didn't look good to me, but I'm not going to judge him. That's for somebody else to do.

MR. BROOKEY: Q. Did you read the report that Dr. Johnson wrote?

A. Yes. I read the declaration. If there's another report underlying that, I did not read that.

Q. So you don't know that he actually wrote his underlying work, do you?

MR. MILES: Assumes facts.

MR. BROOKEY: Q. You don't know that he wrote his underlying report; correct?

MR. MILES: Assumes facts.

THE WITNESS: I don't know that he wrote the report either.

MR. BROOKEY: Q. Okay. What are the penalties of perjury under the laws of the State of California?

MS. SHERIDAN: Calls for a legal conclusion.

THE WITNESS: I don't know.

MR. BROOKEY: Q. Did you know when you signed your declaration under penalty of perjury what those penalties were?

A. No. I assumed it was not good.

Q. Okay.

A. So, good things would not happen to me if I

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was guilty of perjury. So I assumed that there would be some legal sanctions. I didn't know what they were.

Q. All right. It's fair to say, as part of the scientific process, one would start with a hypothesis and then work towards some sort of conclusion; is that correct?

MS. MYLES: Objection; overbroad, vague and ambiguous, lacks foundation.

THE WITNESS: I don't know how different scientists start their research.

MR. BROOKEY: Q. How do you start your research? Do you start with a hypothesis?

MS. MYLES: Objection; overbroad, vague and ambiguous.

THE WITNESS: I usually try and learn something about the area before I start throwing out hypotheses.

MR. BROOKEY: Q. And if that research shows you that the conclusion will be different from the one that you hope to obtain, will you stop the research?

MR. KAPLAN: Assumes facts, argumentative, calls for speculation.

MS. MYLES: Vague and ambiguous as to "hope to obtain."

THE WITNESS: In general, I would let the chips fall where they may. So I'd be guided by

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whatever the data indicated.

MR. BROOKEY: Q. If you were asked to perform an analysis by a client who had hired you to serve as an expert witness and that client, upon reviewing your work, decided it was not helpful to its position, and that client asked you to destroy the results of your research, would you do that?

MR. MILES: Calls for speculation.

MS. SHERIDAN: Compound.

MR. KAPLAN: Incomplete hypothetical.

THE WITNESS: It also depends on the nature of the agreement. If I'm doing research on my own, I never destroy my own research as part of anything. If a client were to give me confidential corporate documents related to a case where I signed a confidentiality agreement, then I couldn't disclose it. So I'd have -- you'd have to go with that. So, sometimes that happens.

MR. BROOKEY: Q. Sometimes a client does ask you to destroy research that proves adverse to their interests?

MS. MYLES: Objection. That entirely misstates his last answer.

MR. BROOKEY: Well, then his last answer was entirely nonresponsive.

MS. SHERIDAN: Argumentative.

MR. BROOKEY: Q. Would you like to answer the question?

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MS. SHERIDAN: He answered your question. Just because you don't like the response doesn't make it an inappropriate response.

MR. MILES: Move to strike your comments, Counsel.

MR. KAPLAN: Can I get the question read back, please.

(Record read as follows:

"QUESTION: Sometimes a client does ask you to destroy research that proves adverse to their interests?")

MR. KAPLAN: I'm also going to add an objection that the predicate question posed as a hypothetical, to the extent this is a subsequent question designed to cross on the first, this no longer is in a hypothetical term.

THE WITNESS: I've never been asked to destroy research because it was adverse to their interests.

MR. BROOKEY: Q. And if you were asked, would you do it?

MR. MILES: Calls for speculation, incomplete hypothetical.

MS. SHERIDAN: Lacks foundation.

MR. KAPLAN: Asked and answered.

THE WITNESS: Well, as part of the U.S. Department of Justice team that did the Exxon Valdez litigation, at the end of that they said, "Whatever

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research has been done is confidential and you can't release it." These are government rules, you know, an incomplete government study. So I wasn't the main person who had the research to release, so I wasn't the decision maker.

But looking at that from afar, if the government doesn't want to release a study or doesn't want to complete it to the point where it can be released, I would think the U.S. Department of Justice and other people would have that option.

MR. BROOKEY: Q. Let me see if I can make this clearer. If a client of yours said, "Hand me all of the research you have done because we don't like the results we want" --

A. On what?

Q. -- "everything you have, and no copies, and we are going to destroy all evidence of this research adverse to our position," would you do that?

MR. MILES: Calls for speculation, incomplete hypothetical, argumentative.

MS. SHERIDAN: He's already answered your question.

MR. BROOKEY: I don't think he has.

MS. MYLES: Vague and ambiguous, overbroad. And particularly vague and ambiguous as to the term "destroy research."

THE WITNESS: Clients generally don't fund my research. Sometimes I do work on cases for

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clients. That's different from my research.

MR. BROOKEY: Q. Dr. Viscusi, does environmental tobacco smoke cause cancer?

MR. MILES: Lack of foundation, outside his area of expertise.

MS. MYLES: Calls for speculation, vague and ambiguous.

THE WITNESS: Well, for smoking in general, if you're asking me does cigarette smoke to the smoker cause cancer, I would say no. Cigarette smoke increases the probability that you'll get cancer for a primary smoker. So even for a primary smoker, I would answer no.

MR. BROOKEY: Q. But I'm not asking about primary smokers. You understand this lawsuit is entirely about exposures to secondhand or environmental tobacco smoke; correct?

MS. MYLES: Objection; lacks foundation, calls for speculation.

MS. SHERIDAN: He was also answer -- he also answered your question, if you listen to it carefully.

MR. BROOKEY: I think the answer should have been yes or no. I heard a long answer.

Q. Dr. Viscusi --

A. I'm clarifying what you mean by "cause."

Q. -- I'm asking you very simply: Does environmental tobacco smoke cause cancer?

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MR. MILES: Same objection; lack of foundation, calls for speculation, outside his area of expertise.

MR. KAPLAN: Asked and answered.

THE WITNESS: I'm also indicating that if, by "cause," you mean is there a 1.0 probability you'll get cancer, no.

MR. BROOKEY: Q. Under any definition, does environmental tobacco smoke cause cancer?

MS. MYLES: Lack of foundation as to what you mean by "any definition."

MR. MILES: Same objection as I previously stated.

MS. MYLES: Calls for speculation, vague and ambiguous.

THE WITNESS: I certainly can't answer a question that's with respect to any possible definition somebody might give to a keyword in the question when I've already given you my definition. I don't know what other definitions you might be hypothesizing.

MR. BROOKEY: Q. Does acetaldehyde cause cancer?

MS. MYLES: Same objections.

THE WITNESS: I don't know.

MR. BROOKEY: Q. Does acrylonitrile cause cancer?

MS. MYLES: Same objections.

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THE WITNESS: Acrylonitrile may increase the probability of getting cancer, but once again, I would not use the word "cause cancer."

MR. BROOKEY: Q. Does benzene cause cancer?

A. Same answer.

Q. Does 1,3-butadiene cause cancer?

MS. MYLES: Same objections.

THE WITNESS: It may increase the probability of cancer, but that's different than causing cancer in all cases.

MR. BROOKEY: Q. Does cadmium cause cancer?

MS. MYLES: Same objections.

THE WITNESS: Caffeine?

MR. BROOKEY: Q. Cadmium.

A. I would give the same answer.

Q. Does formaldehyde cause cancer?

MS. MYLES: Same objections.

THE WITNESS: Same answer. But for most human exposures, zero has been the risk that's within the confidence interval.

MR. BROOKEY: Q. Does environmental tobacco smoke cause birth defects or other reproductive harm?

MR. KAPLAN: Overbroad, vague and ambiguous.

MR. MILES: Outside his area of expertise.

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MS. MYLES: Same objections as before.

THE WITNESS: And the same problem I have with the word "cause." There's not a 1.0 probability, based on my knowledge, that there will be a birth defect.

MR. BROOKEY: Q. Does benzene cause birth defects or other reproductive harm?

MS. MYLES: Same objections.

THE WITNESS: Same answer with respect to what you mean by "cause."

MR. BROOKEY: Q. Does cigarette smoke contain carbon monoxide?

MS. MYLES: Objection; lacks foundation.

THE WITNESS: Yes.

MR. BROOKEY: Q. How do you know that?

A. The surgeon general tells me so.

Q. And what health effects does carbon monoxide have?

MS. SHERIDAN: Objection to the extent that's outside of the area of this witness's expertise.

MS. MYLES: Lacks foundation, calls for speculation, vague and ambiguous.

THE WITNESS: I'm not going to be testifying on the medical consequences, so --

MR. BROOKEY: Q. I'm just asking you what health -- let's actually break it down.

What health consequences to a nonsmoker are

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caused by carbon monoxide in cigarette smoke?

MS. SHERIDAN: You're asking him his personal opinion rather than his professional expertise?

MR. BROOKEY: I'm asking him the question.

MS. MYLES: Objection; vague and ambiguous as to "health effects" and as to the term "cause."

MR. MILES: Again, it's outside his area of expertise, lack of foundation.

MS. SHERIDAN: Lack of relevance based on the witness's previous statement that this is not his area.

THE WITNESS: I'm also unaware of any studies -- in addition to echoing these comments, I'm also unaware of any studies that specifically identify statistically significant effects of the specific constituents of tobacco smoke on health as typically experienced in environmental tobacco smoke settings.

MR. BROOKEY: Q. Are you aware of any studies that indicate that there are no statistically significant effects of the carbon monoxide in tobacco smoke on nonsmokers?

MR. KAPLAN: Asked and answered.

MS. MYLES: Objection; lacks foundation, calls for speculation.

MS. FOE: Could we have the question back, please.

(Record read.)

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MS. MYLES: Objection; same objections, also outside this witness's area.

MR. KAPLAN: And the question contains a negative predicate.

THE WITNESS: Could I hear the question again.

MR. BROOKEY: Sure.

(Record read.)

THE WITNESS: As a general rule, you can never prove no effects. So what you're testing for statistically is whether there's evidence of statistically significant effects.

And I'm aware of no studies that demonstrate statistically significant effects of that particular ingredient, carbon monoxide, in normal exposures to environmental tobacco smoke.

MR. BROOKEY: Q. Does nicotine cause birth defects or other reproductive harm?

MS. MYLES: Objection; vague and ambiguous as to the term "cause."

MR. MILES: Outside his area of expertise.

MS. MYLES: Calls for speculation, lacks foundation, incomplete hypothetical.

MS. SHERIDAN: The witness has already told you more than half-a-dozen times his problem with the use of your word "cause"; yet you continue to use it.

THE WITNESS: So we have the cause problem. We also have the dose problem. You know, if

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somebody's mainlining nicotine, does that count, or are we talking about the nicotine in one cigarette? It's undefined.

MR. BROOKEY: Q. So you don't know whether nicotine causes birth defects or other reproductive harm?

A. I don't know what your question means.

MS. SHERIDAN: Are you talking about nicotine that a primary smoker experiences or that a nonsmoker experiences?

MR. BROOKEY: A nonsmoker.

MR. MILES: Same objections.

THE WITNESS: I know of no evidence that shows that nicotine has a 1.0 probability of causing reproductive harm in nonsmokers.

MR. BROOKEY: Q. Does toluene cause birth defects or other reproductive harm?

MS. MYLES: Same objections.

MR. MILES: Join.

THE WITNESS: Toluene where?

MR. BROOKEY: Q. In tobacco smoke.

A. Once again, I have no evidence that the toluene in tobacco smoke has a 1.0 probability of causing reproductive harm.

Q. Is environmental tobacco smoke known to the State of California to cause cancer?

MS. MYLES: Objection, calls for a legal conclusion.

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MR. MILES: It's vague as to whether you're asking him whether it's been listed, using that terminology, or whether you're asking him to comment on what the state of knowledge is of scientists employed by the State of California.

MR. BROOKEY: Mr. Miles, this isn't even your witness to coach, so I would --

MS. MYLES: The question is vague and overbroad.

MR. MILES: Counsel, I would appreciate if you would not interrupt while I'm making my objection. I'm entitled to make my objections. I think later at trial you'll argue that if I didn't make my objections, I've waived my entitlement to object.

For you to interrupt me when I'm objecting is inappropriate and unprofessional on your part.

MR. BROOKEY: And you would characterize your interruption of your own witness's testimony at Monday's deposition the same way? I want to make that clear on the record.

MR. MILES: You haven't made anything clear on the record. What you did was you interrupted me while I was trying to make my objection to suggest that I was coaching the witness, which was not appropriate on your part.

MR. BROOKEY: I interrupted your testimony, Mr. Miles, not your objection.

MR. MILES: I'm not testifying here. I

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don't think you're confused about that. I'm not a witness. I'm an attorney here. I have a job to do, and I'm trying to do that.

And you may not like the fact that your questions are objectionable and I'm pointing that out to the court in making my record, but that's my job, and I intend to do it, and I would ask you not to interrupt me.

MR. BROOKEY: Q. Dr. Viscusi, could you please tell me --

MS. MYLES: Could we have the rest of Mr. Miles' objection?

MR. BROOKEY: I'm sorry. I thought he was finished with that round.

MS. MYLES: No, he wasn't. That's the whole point.

MR. MILES: Are you going to go on to another question?

MR. BROOKEY: Yes, I am.

MR. MILES: Go ahead and go. I don't need to make the objection if you're moving on.

MR. BROOKEY: Q. Could you please describe to me every Proposition 65 warning that the tobacco industry has given that says, quote, environmental tobacco smoke is known to the State of California to cause cancer, end quote?

MS. MYLES: Objection; lacks foundation, calls for speculation, outside this witness's area.

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THE WITNESS: Are you asking for specific language?

MR. BROOKEY: Q. Yes.

A. That language appears in the warning signs which the tobacco industry assisted in the dissemination of those warning signs, both directly as well as working through trade associations.

Q. Okay. But you don't know that. That's information you've gotten from other sources; correct?

A. How do you ever know anything?

MS. MYLES: Objection. That's compound.

THE WITNESS: I didn't send out the warnings myself. So how do you ever learn about anything? When you say "I don't know it," how do you ever learn about something if you didn't do it yourself? Is it possible for me to ever know anything? What do you mean? I just want to know what do you mean by "I don't know this." Tell me.

MS. SHERIDAN: You seem to presume, like he said, if he didn't personally experience it, then somehow he doesn't know. He cited newspaper articles he's reviewed.

THE WITNESS: The correspondence that was sent out.

MR. BROOKEY: Q. Did you review the deposition transcript of Timothy Flanigan in preparation for your deposition today?

A. No.

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Q. Okay. Did you review the deposition transcript of Debbie Sivas in preparation for your deposition today?

A. No.

Q. Have you reviewed either of those deposition transcripts for any purpose?

MS. SHERIDAN: He just said he hasn't reviewed them.

THE WITNESS: No.

MR. BROOKEY: No. I said in preparation for his deposition. I'm broadening the question.

THE WITNESS: No.

MR. BROOKEY: Q. All right. How many proposition warning signs or warnings have been given by the tobacco industry with respect to -- specifically to the levels of 1,3-butadiene contained in tobacco smoke?

MR. MILES: Vague.

MS. MYLES: Objection; lacks foundation, calls for speculation.

MS. SHERIDAN: Mischaracterizes what the requirements of the law are based by your implication.

MS. FOE: Are you limiting that to California?

MR. BROOKEY: Yes.

MR. MILES: Read the question back, could you, please.

(Record read.)

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THE WITNESS: I don't know of any specific warnings for that.

MR. BROOKEY: Q. Let's turn to page 3 of your declaration.

MS. SHERIDAN: Are you going to want to take a lunch break at some point, Brian?

MR. BROOKEY: Yeah. I think we're about there. I just want to ask him a couple more.

Q. Okay. Look at the first sentence of paragraph 9, please.

A. Page 3.

MR. KAPLAN: Paragraph 9?

MR. BROOKEY: Paragraph 9, page 3.

Q. Have you found that, sir?

A. Yes.

Q. Okay. "The policy objective of informational policies such as Proposition 65, is informed rational choice."

Do you see that?

A. Yes.

Q. On what basis do you draw the conclusion that Proposition 65 is an informational policy?

A. Well, because it deals with warnings. I call warnings policies informational policies.

Q. Any other basis?

A. Well, that's how I interpret the portions of Proposition 65 that I've been involved with.

Q. Is Proposition 65 a policy or is it a law?

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MS. MYLES: Objection; vague and ambiguous.

THE WITNESS: It is a referendum voted upon by the residents of the state of California. Policies can be laws that are a way of implementing the policy.

MR. BROOKEY: Q. And one can disagree with the policy behind the law; correct?

MS. SHERIDAN: Vague and ambiguous.

THE WITNESS: Would you be happier if I called this informational efforts such as Proposition 65?

MR. BROOKEY: Q. Did you write this sentence yourself?

A. I wrote every word.

Q. You wrote every word?

MS. SHERIDAN: He's already testified about that.

MR. BROOKEY: Q. All right. Let's go back to the example you gave earlier of your teenage children driving within the speed limit. In advising them to obey the law, have you ever told them that "I don't agree with what the speed limit law is, so go ahead and exceed it"?

A. No.

MR. BROOKEY: Why don't we go ahead and take a lunch break.

(Luncheon recess taken at 12:04 p.m.)

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AFTERNOON SESSION 1:26 P.M.

(Ms. Corash present.)

MR. BROOKEY: Let's go back on the record.

Q. Welcome back, Dr. Viscusi.

A. Thank you.

Q. You understand that you're still under oath?

A. Yes.

Q. I'd like to go back for a few minutes to the work you did in connection with the Ingredient Communications Council v. Lundgren case, ICC. Do you recall which case that is?

A. Yes, I do.

Q. Okay. That's the 800 number case that you testified about earlier?

A. Right.

Q. Okay. Now, you testified on behalf of the defense in that case?

A. I think they were the plaintiffs.

Q. Those were the plaintiffs, the grocery stores, the Grocery Manufacturers Association?

A. That's correct.

Q. And there was a trade group or some group called Ingredient Communication Council?

A. There were a lot of them, yes.

Q. And you did expert work in that case with regard to an 800 number Proposition 65 warning program; correct?

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A. Well, I did general expert work, and that was one of the topics that I testified on.

Q. You testified at deposition on that topic; correct?

A. And at trial.

Q. I thought you testified earlier that the only other trial testimony you gave was in the Ohio case. Am I remembering incorrectly?

A. In a cigarette case. I did not view this as a cigarette case.

Q. Okay. Thank you for clarifying that.

And you haven't testified in deposition or at trial in any Prop 65 case other than that ICC case and the present one?

A. That is correct.

Q. Did you testify in the ICC case regarding your opinion of the effectiveness of the 800 campaign?

A. I testified generally regarding appropriate warnings for the level of risks that were being warned about. So the 800 number was one component, yes.

Q. Were there other components to the Prop 65 warning program that was in place at that time?

A. I don't recall exactly what I said in terms of the components in place. I did have views generally as to how the state would want to warn about different risks.

Q. What conclusions, if any, did you reach about the manor in which the group you were

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representing or assisting was attempting to comply with Prop 65?

A. The main conclusion was that if the risk is really small -- so in this case you could have risks of 1 in 100,000 lifetime risk, which translated into 1 in 7 million annual risks, you would not want to have on-product warnings that were comparable to, let's say, an on-product warning for cigarettes. You'd want to have less stringent kind of warnings, such as the 800 number.

Q. Because in that case the risk levels in question were substantially lower than those posed by a package of cigarettes?

A. The risk levels are comparable to what you'd get from eating a charcoal-broiled steak. So I thought that you would not want to sound the alarm for very small risks. You'd want different warnings for different levels of riskiness.

Q. So did you draw conclusions -- I think this is what you're saying -- regarding proportionality? In other words, the more serious a risk, the more stringent the warning requirement should be?

A. Depends on whether consumers have information regarding the risk. In general, if people are already knowledgeable of the risk -- and I'm not talking about legal obligations under Proposition 65 but about warnings policies -- if people are knowledgeable of the risk, then you don't need

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warnings because they already know what you're going to tell them.

So it's not just the magnitude of the risk. It's what people know and what you have to tell them to put them in the right place once they've read the warnings or gotten information through some other mechanism.

Q. When you say if people are knowledgeable of the risk, then you don't need warnings, you're speaking as an expert in the field of risk perception analysis?

A. It's not as a legal judgment, if that's what you're asking. This is a judgment with regard to whether warnings serve a constructive economic role.

Q. And it's certainly possible that a warning can be required by law even if, in your view, it did not serve a constructive economic role; correct?

A. I don't know that. I don't know whether the law requires people to do things that don't make sense from an economic standpoint. Depends on the law.

Q. And again, those types of legal requirements are outside your area of expertise; correct?

MS. MYLES: Objection; overbroad, vague and ambiguous.

MS. SHERIDAN: That misstates his prior testimony.

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THE WITNESS: I think I've addressed that issue earlier. To the extent that I can make judgments based on my expertise, it may have some pertinence to your legal obligations.

MR. BROOKEY: Q. What types of risks were at issue in the ICC case?

A. I think it dealt largely with low-probability risks from grocery store items such as cereal, whether you'd warn people about BHT in the packaging of cereal, for example. So that was my understanding of the risks I was talking about.

Q. What is BHT?

A. It's a chemical put in as an ingredient to preserve the freshness, and it prevents spoilage of cereals. Sometimes it's in the packaging. Sometimes it's in the cereal itself.

Q. At the time you gave testimony in the ICC case, let's say at the time your deposition was taken, was BHT a listed chemical under Proposition 65?

MS. MYLES: Objection; lacks foundation.

THE WITNESS: I don't know when the list came out, but at the time I was involved, everything was really in the speculative stage, and I think the state didn't really know what it wanted to do.

So my understanding is that things had not been finalized. Certainly, the science board advising the state on this still seemed very much up in the air. So it was not clear how things would play out.

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MR. BROOKEY: Q. In connection with the ICC case, what, if anything, did you do to analyze the public's preexisting perception of the risk posed by BHT in cereal?

A. Well, I gave that as an example of something. So the answer is nothing.

Q. What, if anything, did you do in connection with your work on ICC to analyze the public's preexisting perception of the risks posed by any of the chemicals at issue in that litigation?

A. Well, I did ask the public regarding the changes in risk beliefs for cereal that would occur before and after the warnings. So I'm not so much concerned with risks associated with specific chemicals as I am with risks associated with particular products and the mechanisms by which you can incur the risk.

Q. Did you perform a survey with respect to the public's knowledge in connection with your work on the ICC case?

A. I did the survey in Illinois. I'm not sure when it was done, but I think it was done after the ICC case.

Q. When I asked you what you had done in connection with your work on ICC to analyze the public's perception of risk, you said you did ask the public.

A. I don't -- I said that?

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Q. Yes.
A. I said I asked the public?
Q. Yes. Was that just a misstatement?
A. I don't recall saying it.
Q. Well, let's --
A. I did ask the public in Illinois.
Q. Okay.
A. But I was not paid to do that as part of the ICC case, and I don't know if that happened before or after the case.
Q. So in connection with your work on the ICC case, did you have any data in your possession that dealt with the public's preexisting perception of the risks posed by any of the products that the grocery stores were selling?
MR. MILES: Including cigarettes? Are you including any product that might be in a grocery store and the public's perception of risk associated with any such product?
MR. BROOKEY: Yes.
MS. SHERIDAN: Overbroad.
MS. MYLES: Could you read back the question, please.
(Record read.)
THE WITNESS: I'd seen data on risk perceptions regarding high fat foods, alcoholic beverages, cigarettes, and these are among the products sold.

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MR. BROOKEY: Q. Were those data specific to Californians?

A. I don't recall which ones were and which ones weren't. There are a lot of studies I've reviewed.

Q. Can you specifically recall any data that were based on California?

A. This is over a decade ago.

MS. MYLES: Objection; vague and ambiguous.

THE WITNESS: So I'm not sure which studies I reviewed.

MR. BROOKEY: Q. And in preparing to give your expert deposition in this case, you didn't review your files from the ICC case?

A. I'm not sure I even have any files left over from that case.

Q. Now, at deposition you were asked questions about your conclusions that you had drawn with respect to the existing or the preexisting state of public risk perception with regard to the products at issue in the litigation; is that correct?

MS. SHERIDAN: Which case are you talking about?

MR. BROOKEY: The ICC case.

THE WITNESS: I don't recall that. Do you have the deposition handy? This is over ten years ago, so I don't recall having said that.

MR. BROOKEY: Q. Did you reach a

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conclusion as to whether, given the public perception of risks, the 800 number Proposition 65 warning program was an appropriate means of conveying the information required under Prop 65?

MS. MYLES: Objection; vague and ambiguous.

THE WITNESS: I don't think my task was as broad as you indicated.

MR. BROOKEY: Q. So you didn't make such a broad conclusion?

A. I don't recall doing so. In fact, I even recall recommending a varied warning program of which that would be a part.

Q. What were the other elements of that program, if you recall?

A. You could have on-product warnings, you could have posted information in stores, you could have books that people could look up things in the stores, or you could have an 800 number. So you have different kinds of warnings mechanisms you could use for different risks, depending on the particular circumstances.

Q. Are you familiar with the regulations under Proposition 65 relating to what's called an NSRL, or no significant risk level?

MR. KAPLAN: Vague.

THE WITNESS: Yeah. I don't recall the specific regulations.

MR. BROOKEY: Q. Have you ever heard the

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term "NSRL" before today?

A. I've heard no significant risk levels, but not NSRL. Nobody's used that four-letter designation for this.

Q. And you've never taken any existing NSRL under California law and performed a risk assessment based on any exposure data; correct?

MS. SHERIDAN: Vague and ambiguous.

MS. MYLES: Objection. The witness just testified he doesn't use the term "NSRL," so to incorporate it into the question is confusing.

THE WITNESS: And it's also not defined with respect to what risk we're talking about. So it's unclear to me whether you're talking about risks of morbidity, mortality, cancer, noncancer.

MR. BROOKEY: Q. Well, let me ask this another way. Have you ever done any risk assessment under Proposition 65 with respect to environmental tobacco smoke?

A. No.

Q. Are you familiar with the Prop 65 regulations dealing with what's called a no observable effect level, or NOEL?

A. I know -- I know what that terminology means for EPA, but I don't recall reading the California variant of this.

Q. What is your understanding of what that terminology means in the context of the EPA?

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A. Or in the context -- any context. No observable effects would pertain to no effects, either beneficial or adverse. It's not making any distinction of exposure to a particular chemical. Typically, it's discussed with respect to reproductive hazards.

Q. Is there a difference between a no observable effect level and a low observable effect level?

MR. KAPLAN: Lacks foundation.

MS. MYLES: Vague and ambiguous.

THE WITNESS: Depends on what you mean by "low," but low observable effects would be nonzero, no observable effects would be zero.

MR. BROOKEY: Q. Are you familiar with the levels of risk with regard to carcinogenicity only that plaintiffs in this lawsuit are alleging are posed by environmental tobacco smoke?

MS. MYLES: Could you read the question back, please.

(Record read.)

MR. KAPLAN: Vague and ambiguous as to what he means by, quote, level of risk.

MS. SHERIDAN: Object to the extent it's beyond this witness's expertise.

MS. MYLES: Also lacks foundation, calls for speculation about plaintiffs' contentions in this lawsuit.

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THE WITNESS: The biggest problem I have is I don't really know what you mean by "levels of risk." For what exposure are you talking about?

MR. BROOKEY: Q. I'm talking about any. You said earlier that you read Dr. Nazaroff's declaration; correct?

A. Yes.

Q. You read his exposure analysis?

A. If it's part of the deposition -- or of his declaration, yes.

Q. And you saw that there were a number of chemicals that, according to Dr. Nazaroff's analysis, are contained within environmental tobacco smoke that exceed the established no significant risk levels according to the California regulations; correct?

A. I did read that, yes.

Q. Did you do anything with that information in preparing an expert opinion in this case?

A. No.

Q. You didn't form any opinion as to what the scope of an appropriate warning would be given those exposure levels and NSRLs; correct?

MR. KAPLAN: Asked and answered.

MR. MILES: Read it back, please.

(Record read.)

MR. MILES: The question's ambiguous as to whether he formed any opinions about appropriate warnings predicated specifically on that as a fact or

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whether he formed any opinions at all.

THE WITNESS: I was not in a position to make independent scientific judgments as to whether what he said was correct, so I have no reason to believe that it was.

MR. BROOKEY: Q. Now, with respect to the declaration that was submitted by Dr. Kelman, one of defendants' experts, he has exposure data also regarding certain chemical constituents of environmental tobacco smoke.

Did you review his data and, based on those data, form an opinion as to what an appropriate Proposition 65 warning would be, assuming those data were correct?

MR. MILES: Compound.

MS. MYLES: Objection.

MR. KAPLAN: Assumes facts, argumentative.

THE WITNESS: I don't recall seeing Dr. Kelman's declaration.

MR. BROOKEY: Q. In reviewing Dr. Nazaroff's declaration, did you notice the sections discussing exposure levels to certain Proposition 65-listed chemicals that are known reproductive toxicants?

MS. MYLES: Objection; assumes facts not in evidence, vague and ambiguous.

MR. MILES: Could you read the question back, please.

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(Record read.)

MR. MILES: Assumes facts the way it's phrased.

THE WITNESS: I don't recall whose declaration I saw the known reproductive toxicant discussion in. So I read a lot of things, and I didn't log which came from where.

MR. MILES: Counsel, is it possible to turn off the fan here? It's real hard to hear you with the noise in here.

MR. BROOKEY: I actually understand that it's controlled by the building. I checked into that earlier. So when we take a break, I'll see if there's any way we can get the building to do that.

MR. MILES: If you could keep your voice up, it would probably help too. Thanks.

THE WITNESS: Can you hear me?

MR. MILES: Generally. As a rule, I don't have to object to your comments, but I do have to object to his.

THE WITNESS: Feel free.

MR. BROOKEY: Nobody says you have to, Don.

Q. So, again, you did not form an opinion as to what an appropriate Proposition 65 warning would be relative to the risks posed if Dr. Nazaroff's data are assumed to be true as far as reproductive toxicants are concerned; correct?

MR. MILES: Again, the question's ambiguous

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as to whether he formed any opinion at all about appropriate warnings or whether he formed an opinion about an appropriate warning predicated specifically on a specific factor related to Dr. Nazaroff. It's ambiguous.

THE WITNESS: I formed an opinion based on two things: first, my own reading of the literature on environmental tobacco smoke and lung cancer, since we're concerned with cancer; and assuming there was some link -- and I don't think you can make that assumption -- what would an appropriate warnings policy be? So I did it both ways, because I didn't know how the scientific evidence testimony would play out.

MR. BROOKEY: Q. And what is your conclusion regarding what an appropriate warnings policy be?

A. What they did was undertake an effort that broadly disseminated information regarding the hazards of secondhand smoke, such as the sign on your building, and the net result has been that there is widespread awareness of the hazards of environmental tobacco smoke as viewed by the State of California.

Q. Now, when you talk about what they did to broadly disseminate information, to whom are you referring?

MS. SHERIDAN: Asked and answered.

THE WITNESS: The tobacco industry, either

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directly or indirectly through its efforts.

MR. BROOKEY: I'd like to ask the court reporter to mark as Exhibit 80 a copy of an article entitled "Secondhand Smoke: Facts and Fantasy."

(Whereupon, Plaintiffs' Exhibit 8 was marked for identification.)

MR. BROOKEY: Q. Dr. Viscusi, I assume you've seen at least some version of this article before.

A. Yes.

Q. And this is an article that was published at least at a time in which you were a professor of economics at Duke?

A. That's correct.

Q. Were you a professor of economics at Duke at the time you wrote the article for publication?

A. Yes.

Q. Was this article peer-reviewed?

A. They do a review process, but I would not characterize it as being at the same level as the American Economic Review, which is blind. I don't know how they handle the review process. It may be within the organization that publishes it. I'm not sure if it was published by the Cato Institute. I'm not sure if they published it at the time or whether it was American Enterprise Institute. But they have an internal review process where Ph.D.s review it.

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I'm not sure what you want to call that, but that's what it was. So it wasn't just send in an article and they automatically publish it.

Q. Was this an article that was solicited, or was this something that you submitted on your own initiative?

A. I submitted it.

Q. Was this prepared at about the same time you were giving your testimony to OSHA?

A. I don't recall the exact dates. My guess would be is that it would be after I did the testimony.

Q. Would it be helpful if I told you that the OSHA hearings lasted between about September of '94 and March of '95?

A. Do we have a date on the article? '95. I think this came after.

Q. That this article came after?

A. Yes.

Q. Now, were any of the data on which you relied or which you discussed at the OSHA hearings used by you in preparing this article?

A. I would assume so, since once I have a certain set of facts, I don't go out and get new facts, because there's certain things in the literature you draw upon. So I would want to cite the same principal facts.

Q. Did you come up personally with the title

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of this article?

A. It may have been one that they came up with at the journal, the editors. I don't recall, but -- I don't actually remember.

Q. Do you know what this article intends to convey by use of the term "fantasy" in the title?

A. Possible public misperceptions of the risk.

Q. The risk posed by secondhand smoke?

A. That's correct.

Q. When is the last time you read this article?

A. I don't think I've ever read it.

Q. It's not among the documents you reviewed in preparing for your testimony?

A. That's correct. I wrote it, but I hadn't gone back to read it. I want to clarify.

Q. No, I understand that. I want to ask you whether anything in here, any positions that you espoused in this article are different from any positions you hold today; but if you haven't read it, I don't want to hold you to your answer if you're not comfortable answering.

A. It's been 14 years.

MS. MYLES: Is there a question pending?

MR. BROOKEY: No. I'm just -- actually, I think there is.

Q. I don't think it's been 14 years. It's been four years.

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A. Four years, '95.
Q. Right, because I believe this article is actually cited in your declaration. You didn't go back and review this article in preparing your declaration?
MS. MYLES: Is there a -- object to the form of the question.
THE WITNESS: Is the question did I review the article for my declaration?
MR. BROOKEY: Q. Correct.
A. No.
Q. In preparing your declaration, did you review any published literature specifically for the purpose of preparing your declaration?
A. All these things. So there are boxes of things I reviewed. So they're published. I'm not sure if you call it literature, but the final report of the Gallup organization, Stanford, et cetera. So this whole stack of things.
Q. So, for instance, you reviewed an article by Viscusi and -- I think you have to be careful how you pronounce this.
A. Magat.
Q. Magat. Okay.
-- Learning About Risk?
A. That's a book. I did not open the book as part of the preparation.
Q. And what about Magat and Viscusi,

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Informational Approaches To Regulation? Did you review that?

A. No. Since I wrote it, I figured I didn't have to open the book.

Q. Did you review Smoking: Making the Risky Decision?

A. No.

Q. Did you review Enterprise Responsibility for Personal Injury published by the American Law Institute?

A. No. But once again, I've read the pertinent sections before.

Q. You certainly didn't cite in your declaration anything that you haven't reviewed or written at some point in time; correct?

A. That's correct.

Q. In the process of preparing your declaration, did you do what I think in word processing terms is usually referred to as cutting and pasting, lifting paragraphs or sentences from prior documents that you had prepared?

A. No. I stole, I guess, the first sentence and maybe the last sentence from Dr. Johnson's declaration with some amendments, but other than that, everything I just did from scratch for this case.

Q. Now, the main focus of this article appears to be on economic considerations with regard to secondhand smoke. Is that a fair characterization?

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MS. SHERIDAN: When you say "this article," you're talking about Exhibit 80?

MR. BROOKEY: Yes, I am. Thank you.

THE WITNESS: Yes.

MR. BROOKEY: Q. And that's also the primary focus of your analysis in your declaration; correct?

MS. MYLES: Objection; overbroad, vague and ambiguous, misstates his prior testimony.

THE WITNESS: I think the emphasis of the declaration and the article are different. The emphases.

MR. BROOKEY: Q. In what ways are the emphases different?

MR. KAPLAN: Overbroad.

MS. MYLES: Objection; overbroad, vague and ambiguous.

THE WITNESS: Many things in this article don't even show up in my declaration; for example, talking about the insurance costs of smoking. So I'd say they're different in some respects.

MR. BROOKEY: Q. Now, if you could turn to the second page, the second paragraph, the paragraph beginning "Cancer researchers," do you see that?

A. Yes.

Q. And then the third line from the bottom -- I'll go ahead and read this -- "It should be noted at

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the outset that the consensus among economic researchers, including the Congressional Research Service, is that the state of science with respect to ETS is too uncertain to warrant estimation of the health consequences."

Do you see that?

A. Yes.

Q. On what did you base your remark concerning the consensus among economic researchers?

A. Well, the principal studies that I was referring to are those by a group of economists at the Rand Corporation funded by the United States government to analyze the financial costs of smoking, and they concluded that the evidence with respect to ETS was too soft to pin down any costs.

And the Congressional Research Service report, also on the cost of smoking, did a sensitivity analysis, but indicated that, once again, we didn't have any firm assessment of what the risks were.

Q. Now, to your knowledge, is there a consensus among cancer researchers, rather than economic researchers, that the risks posed by ETS are uncertain?

A. Well, every article I've read from the cancer research literature fails to show a statistically significant effect at the 95 percent confidence level. So that looks like uncertainty to me, but what's going through their heads in the

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privacy of their laboratory, I don't know what they're thinking.

Q. But you haven't read anything that reflects a belief that the consensus, not the conclusions drawn from what cancer researchers may report, but that the consensus among cancer researchers is that the state of science with respect to ETS is uncertain; correct?

MR. KAPLAN: Vague as to the distinction being drawn in the question.

THE WITNESS: I don't think science is determined by popular vote. I think it's determined by scientific evidence.

I've seen no scientific studies indicating a statistically significant link between environmental tobacco smoke and lung cancer judged by the usual statistical significance levels.

MR. BROOKEY: Q. I understand that you disagree with what the cancer researchers are reporting. What I'm asking --

A. No. I'm agreeing with their report. They're reporting no statistically significant risk. I'm not agreeing or disagreeing. I'm willing to accept the evidence, whatever it is, that they present. They're presenting evidence saying there's no statistically significant risk. I'm not here to second-guess it. I'm just interpreting it from a statistical standpoint.

Q. Okay. What I'm asking you is: When you

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say the consensus among economic researchers, aren't you talking about whether those economic researchers subjectively believe that the state of science with respect to ETS is uncertain?

MS. MYLES: Objection; vague and ambiguous, lacks foundation.

THE WITNESS: What I am saying is that in the other economic studies of the costs of smoking, the researchers have concluded that the evidence was too fragile and not strong enough to indicate a precise statistically significant positive medical cost associated with environmental tobacco smoke.

MR. BROOKEY: Q. But it cannot be said that the consensus among cancer researchers is that the state of science with respect to ETS is uncertain?

MR. MILES: Asked and answered.

MR. BROOKEY: Correct.

MR. MILES: Lack of foundation.

MS. MYLES: Objection; vague and ambiguous.

THE WITNESS: You're going back and forth. My text says economic researchers. Now you're telling me that I'm saying this about cancer researchers.

MR. BROOKEY: Q. I'm trying to ask you, sir, and I'm waiting for an answer to the question.

A. And I don't care what the popular vote is of cancer researchers. What I care is: What do the scientific studies say?

Q. So you care about the popular vote among

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economic researchers?

A. No. This is what the economic researchers who've worked on this say. This was not a poll of the American Economic Association. These are statements done by the principal researchers in the field relating to the medical costs of smoking.

Q. And those statements are "The state of science with respect to ETS is uncertain"; correct?

MR. MILES: Can you read it back, please.

(Record read.)

THE WITNESS: Words to that effect, yes.

MR. BROOKEY: Q. And what I'm asking you very simply is: Have cancer researchers said words to that effect?

MS. MYLES: Objection; lacks foundation, vague and ambiguous, asked and answered.

THE WITNESS: All I know is that every study I have read, the conclusion of the study is that at a 95 percent confidence level, there's no statistically significant evidence of a risk. Now, this would indicate either that we don't know enough at this point to draw conclusions or that there's no risk. This is what the evidence means when you present those results.

MR. BROOKEY: Q. Who's in a better position to evaluate medical evidence relating to cancer? An oncologist or an economist?

MS. SHERIDAN: Argumentative.

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MR. MILES: Calls for speculation, incomplete hypothetical, vague.

MS. MYLES: Vague as to the term "medical evidence."

THE WITNESS: I think when these -- first of all, I'm evaluating their results as they are reported. So I'm not second-guessing the studies.

But when it comes to statistical tests, I think there's no question that economists trained in econometrics have more experience doing statistical analysis than the typical doctor. They just do not have lots of formal training in statistics.

MR. BROOKEY: Q. So if I want to know whether something causes cancer, I shouldn't listen to my doctor; I should listen to my accountant?

MR. MILES: That's argumentative, Counsel.

MR. KAPLAN: To the extent that that's an attempt at summarizing the former question, it's inaccurate.

THE WITNESS: It's preposterous.

MR. BROOKEY: Thank you.

Q. By the way, you're familiar with the EPA's classification of environmental tobacco smoke as a Class A carcinogen, are you not?

A. Yes. I'm also familiar with the court decision that threw out their study.

Q. And you're familiar -- you know that that's on appeal currently; correct?

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A. The last thing that happened, it got thrown out.

Q. Okay. And you also know that a Court of Appeal in California threw out the 800 warning program in the ICC case; correct?

A. Right. And --

Q. All right.

A. I don't think that's still under appeal, though.

Q. No. That one's over. The 800 warning program is dead.

Now, were you working with the EPA at the time of consulting with the EPA at the time ETS was listed as a Class A carcinogen?

MR. KAPLAN: Overbroad.

THE WITNESS: I've been working with EPA nonstop since 1983.

MR. BROOKEY: Q. Did you have any involvement in the process that led to ETS being listed as a Class A carcinogen?

A. No.

Q. Were you asked to become involved?

A. No.

Q. Did you ask to become involved?

A. No.

Q. Can you turn to page -- look at the upper right-hand corner where it says "Page 4 of 8" on Exhibit 80. Do you see that?

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A. Page 4 of 8?
Q. Yes. You see the heading called "The Role of Market Forces"?
A. Right.
Q. And in analyzing economic considerations relating to ETS, you compare ETS's effect on nonsmokers in a restaurant to music that is too loud. Do you see that?
MR. MILES: Counsel, can you be more specific where you're referring to?
MR. BROOKEY: Sure. It's the first paragraph under "The Role of Market Forces."
THE WITNESS: I don't compare ETS to music. I say that these are both externalities.
MR. BROOKEY: Q. And the externality of carcinogenicity is not an element of what you're saying or making the point contained in this paragraph; is that right?
MS. MYLES: Objection; assumes facts not in evidence, vague and ambiguous.
THE WITNESS: I have no idea what the question means.
MR. BROOKEY: Q. Well, in other words, when you are -- when you're saying that ETS and music are both externalities, what do you mean by using that term?
A. There are various aspects of your environment that affect you that you may not have

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contracted explicitly for.

Q. Okay. And it's a separate issue from whether the element that you did not contract explicitly for happens to be carcinogenic; right?

MS. MYLES: Objection; lacks foundation, calls for -- incomplete hypothetical, assumes facts not in evidence, vague and ambiguous.

THE WITNESS: Externalities or public goods can pertain to carcinogens, music, other things as well.

MR. BROOKEY: Q. Now, if in a restaurant you're discussing in this paragraph there is a gunfight -- let's actually make it a saloon rather than a restaurant -- the music is too loud and there's a gunfight and bullets are whizzing through the air, would you place the gunfight on the same level of externalities as you place the music?

MR. KAPLAN: Vague and ambiguous as to the concept of placing an externality on the same level as something else.

MS. MYLES: Also incomplete hypothetical, lacks foundation.

THE WITNESS: And nowhere here am I placing anything on levels. So I don't know what you mean by that.

MR. BROOKEY: Q. Okay. Let's turn to paragraph 10 of your declaration that was previously marked.

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A. Page 10?
Q. Paragraph 10 on page 3.
A. Oh.
Q. Do you see the first sentence of that paragraph, "The reference point for assessing the welfare consequences is to assess the benefits and costs to all parties."
Do you see that?
A. That's correct.
Q. Now, when you use the term "welfare consequences," how are you using that?
A. From the standpoint of welfare economics.
Q. This is your area of expertise, not mine. What do you mean, welfare economics?
A. So from the standpoint of -- from the standpoint of the overall benefits and costs to society, you want to look at the benefits and costs to everyone, not just the benefits and costs to one set of parties.
Q. So those benefits and costs, you're using those in very literal terms in terms of economic benefits and economic costs?
A. Well, we consider virtually everything economic, so there's nothing outside of our domain. So health risks are economics, rare species of birds are economics.
Q. How are rare species of birds?
A. It's not, but economists are willing to put

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a dollar -- in the Exxon Valdez oil spill, the economists valued the loss of dead birds. So there's -- I see nothing within the area of environmental tobacco smoke that economists, potentially, with research, could not put a dollar value on.

Q. Have you ever performed any expert services in connection with a wrongful death lawsuit?

A. Yes.

Q. And in that capacity, have you been asked to place an economic value on the life that was lost?

A. Well, typically, you're asked to calculate the economic loss to the survivors; and to the extent that hedonic damages have come up, I've opposed the concept.

Q. I'm actually not talking about hedonic damages, but more, for instance, if the breadwinner of a family -- sole breadwinner of a family is killed in an auto accident and the survivors bring a wrongful death suit, there's some economic model for determining the value of the survivors' claims; correct?

A. Yes.

Q. Based in part on life expectancy of the sole breadwinner or earnings potential, things like that?

A. These and other things go into it, yes.

Q. And how often have you given that type of

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testimony in a wrongful death context?

A. I really don't know, but I would say dozens.

Q. Have you done any of that type of expert work in the state of California?

A. Yes.

Q. How many times?

A. I don't know. Once or twice. I consulted on a number of cases for the Justice Department that were in California, but was not deposed. I know I've done at least one where I was deposed in such a case.

Q. Which case was that?

A. I don't recall.

Q. Now, in the dozens of times you've testified in that regard, have you testified exclusively on one side or the other; that is, for plaintiffs or for defendants?

A. I've testified in deposition for both plaintiffs and defendants, and I've testified in trial for plaintiffs, but I don't recall testifying for defendants on the lost earnings economic damages issue.

Q. There may be some overlap here. Did any of these cases involve wrongful death suits brought with respect to smokers who died of smoking-related illnesses?

A. I'm not referring to any smoking cases. So I've done no personal injury damages calculations for

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plaintiffs in smoking cases.

Q. Now, when you are determining the economic damages that flow from an untimely death in a wrongful death lawsuit, do you look at amortization tables to determine life expectancy for the person?

A. I look at the Statistical Abstract of the United States and figure out life expectancy.

Q. And do you factor in elements that would reduce that person's life expectancy?

A. Typically not. I would wait and let the evidence at trial indicate whether the person was going to live shorter or longer. So I would use the gender, the current age of the person, and the race. So I'd make it specific to the demographic characteristics, but wait for the evidence at trial to bring to bear any information regarding lifestyle factors.

Q. But eventually the lifestyle factors do enter into the equation; right?

A. They sometimes come up.

Q. Those would include, for instance, obesity?

A. It could be a factor, but there's a debate as to how obese you have to be before it matters.

Q. What about engagement in risky activities?

MR. KAPLAN: Overbroad.

THE WITNESS: Conceivably it could come up.

MR. BROOKEY: Q. What about if the person who was killed in an accident already had a fatal

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illness at the time of the accidental death? That would have an impact?

A. I haven't had any cases like that.

Q. But assuming that were the case, that would have an impact on the amount of economic --

MR. MILES: Calls for speculation, incomplete hypothetical.

MR. BROOKEY: Q. -- damages?

MS. MYLES: Lacks foundation.

THE WITNESS: I don't know how the jury would treat this. But my calculations would be based on the loss to the family based on the medical evidence as it -- and the actuarial evidence regarding the expected future life of the person.

MR. BROOKEY: Q. Now, excessive alcohol use would also be something that you would expect to lower the life expectancy?

A. Well, by definition --

MR. MILES: Hang on a second. Lack of foundation the way the question is framed.

THE WITNESS: I think the problem is the word "excessive." I don't know what excessive is. There are studies that indicate that moderate alcohol use extends your life, whatever that moderate means.

MR. BROOKEY: We're all in the pursuit of the line between moderate and excessive.

Q. What about tobacco use? Is that a factor?

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MR. MILES: Vague.

THE WITNESS: I don't know the extent to which it's come up. I would think that it wouldn't affect the present value of lost earnings.

MR. BROOKEY: Q. And you're aware that previously Brown & Williamson was owned by a company that also had insurance divisions?

A. I didn't know that.

Q. So you're not aware of the increase in insurance premiums or the higher amount of insurance premiums that Brown & Williamson's parent charged to smokers versus nonsmokers?

MS. SHERIDAN: Lack of foundation, calls for speculation.

THE WITNESS: I didn't know Brown & Williamson had a parent.

MR. BROOKEY: Q. Now, if you look at paragraph 10 again on page 3, the sentence beginning at the end of line 13, "In the case of environmental tobacco smoke, the costs of smoking restrictions include the welfare loss to the smokers themselves, where the economic value of this loss may be substantial."

Do you see that?

A. Yes.

Q. What is the welfare loss that a smoker suffers as a result of smoking restrictions?

A. If you ban smoking, let's say, from 9:00 to

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5:00 because -- for whatever reason the smoker can't smoke, let's say it's inconvenient to go outside, there's no smoking lounge, then the smoker loses the consumptive benefits that he or she would experience from smoking.

Q. What do you mean by the term "consumptive benefits"?

A. The economic value they derive from their smoking behavior.

Q. How do you go about quantifying the economic value to the smoker of smoking a cigarette?

A. Well, let's say I have to pay $3 for a pack of cigarettes, which I do, but I say to myself that's worth $10 to me, I get $10 worth of enjoyment from it. The net economic value would be $7.

Q. So in other words, if someone would pay $10 for a product that only costs 3, the economic benefit is $7?

A. That's correct.

Q. Are there any data that support that type of analysis and actually does quantify in the real world how much more a smoker would pay for a pack of cigarettes than he or she actually does?

A. Yes.

Q. Are those reflected in your declaration?

A. Well, they're in my article "Secondhand Smoke: Fact and Fantasy," and they're also in my book Smoking: Making the Risky Decision, which is a more

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extensive treatment of that data -- of those data.

Q. You have no current data, though?

MS. MYLES: Objection; vague and ambiguous as to the term "current."

MS. SHERIDAN: And it also misstates his prior testimony.

THE WITNESS: I've seen estimations run and not yet published, and they're in the same range, using very current data, for an article that's going to be coming out in the Journal of Risk and Uncertainty. So there have been literally dozen of studies estimating cigarette demands curves, and they all cluster in the same range.

MR. BROOKEY: Q. But have you seen any data with respect to this economic value to engaging in this activity that are specific to California in 1999?

A. The one discussion I've seen is in the New York Times where there is a something like a 30 percent drop in cigarette smoking in the past year, some of which is due to price increases, which would lead one to believe that the same kind of demand responses that are at the foundation of this analysis still pertain.

Q. Now, these price increases have resulted primarily because of increases on cigarette taxes; correct?

A. Yes.

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MR. MILES: Lack of foundation --
MR. KAPLAN: Calls for speculation.
MR. MILES: -- of personal knowledge.
MR. BROOKEY: Actually, let me -- I think the problem may be the use of the word "primarily." I'm sure cigarette companies want to make more profit on their products as well, so let me just change it.
MR. KAPLAN: Move to strike the comments of counsel.
MR. BROOKEY: Q. One element of price increases in cigarettes in the past several years has been an increase in taxes on those products; correct?
MR. KAPLAN: Calls for speculation.
MS. MYLES: Objection; lacks foundation.
THE WITNESS: Taxes --
MS. MYLES: Vague and ambiguous.
THE WITNESS: Depending on what you mean by "past several years," over time taxes have gone up, some of which are indirect through the master settlement.
MR. BROOKEY: Q. And you've done some amount of analysis and writing as to the economic wisdom of increasing taxes on cigarettes to pay for the costs of smoking-related illnesses; correct?
MS. MYLES: Objection; vague and ambiguous.
THE WITNESS: I don't know what you mean by "wisdom." I don't think I tried to say it's a wise or unwise tax.

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MR. BROOKEY: Q. Well, I heard you use the word "folly," because the articles you've written have been critical because of some of the factors we've discussed in the past, including the fact that smokers end up saving the states money by dying earlier; correct?

MR. KAPLAN: Move to strike the initial comments of counsel.

THE WITNESS: I've analyzed the costs associated with smoking and have concluded that they do not justify, if that's your only basis, increasing taxes.

MR. BROOKEY: Q. And that's because there's an offset that smokers may incur health costs but they save in other ways because they die earlier; correct?

A. No. Even without the alleged offset issue, put it, the medical care costs associated with smoking are below the total taxes.

Q. And you've also criticized increased taxes on cigarette products as regressive; correct?

A. They are regressive.

Q. They're regressive because they fall disproportionately on the poor?

A. Extremely disproportionately.

Q. And how does that occur?

A. The poor are more likely to smoke than the rich. So even if their incomes were the same, taxes

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would be higher for them. But their incomes are less. So not only do they spend a higher proportion of their income on cigarettes, which is what we mean by "regressivity" in terms of the taxes, but they also pay a higher absolute cigarette tax. So it's an extremely regressive tax.

Q. And that's a matter of policy that's something I think you've written is a bad public policy move?

A. I don't draw value judgments. I point out that if you're concerned about regressivity and don't want to penalize the poor, then you might want to worry about cranking up the cigarette tax because it's primarily going to affect the poor.

Q. Are poor -- are the poor, the people on whom these taxes are falling disproportionately, likely to be overeducated as compared to the general population?

A. Well, if you're poor, you continued to have less --

MS. FOE: Vague and ambiguous as to "overeducated."

MR. BROOKEY: I'm sorry. Let's have the witness finish his answer.

MR. MILES: I think you have to make the objections before the answer, Counsel. That comment's inappropriate.

Could you read the question back, please.

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(Record read.)
THE WITNESS: I've seen no studies indicating that the poor are overeducated.
MR. BROOKEY: I think Ms. Foe was actually right.
Q. Let's say more educated than the general population. Does that change your answer?
MS. MYLES: Vague and ambiguous.
THE WITNESS: I've seen no studies indicating that the poor on average are more educated than the general population.
MR. BROOKEY: Q. Are you aware of any data that show that the poor on average are less educated than the general population?
A. Education and income tend to be positively correlated.
Q. And there are data to that effect?
A. Yes.
Q. And you don't have any published studies that challenge that correlation; correct?
A. It would be ludicrous to challenge that correlation. There's a huge literature, including my studies, that show that education raises your income.
Q. Now, much of your work seems to deal primarily with the welfare consequences as they relate to smokers; is that correct?
A. Some does. Some deals with the costs of smoking to insurance companies, to government

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agencies, the cost of environmental tobacco smoke.

Q. Well, let's look at welfare consequences. Have you ever analyzed the welfare consequences to a nonsmoker of being exposed to environmental tobacco smoke?

A. By "welfare consequences," are we talking economics here or are we talking something else?

Q. I believe you used it earlier as a term of art to primarily focus on economic consequences. So I'd like to use it the way you were using it before.

A. I have done a calculation of the costs of environmental tobacco smoke if you were to take the EPA and OSHA estimates at face value.

Q. And what are the results of that calculation?

A. I forget the results. I mean, I've done them, but I don't memorize every number that I've generated.

Q. And they're not reflected in your declaration; correct?

A. They're not in this declaration.

Q. Were they in a prior draft of your declaration?

A. No.

MS. SHERIDAN: That misstates his prior testimony, Counsel.

MR. BROOKEY: Q. Were those numbers something you discussed with any attorneys in the

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context of this litigation?

A. I don't recall discussing them. I may have. I just don't remember.

Q. Now, with respect to the concept that -- and putting aside any offset or any effect of the cigarette tax that is paid on a pack of cigarettes -- because that tax is only paid once; correct? You buy a pack of cigarettes, you end up paying the tax one time; correct?

A. Every time you buy the cigarettes, you pay the tax.

Q. Right. No matter how many people are exposed to the environmental tobacco smoke from that pack of cigarettes, the smoker is paying the tax on that pack one time?

A. Even if he exposes --

MR. MILES: Hang on a second.

Assumes facts, the tax is paid by the smoker. Assumes facts contrary to the evidence.

MR. BROOKEY: Q. In other words -- do you smoke?

A. No.

Q. Do you know people who smoke?

A. I'm trying to think. I must. Let's assume I do.

Q. Let's assume you smoke.

A. I -- actually, I do recall a student who smoked.

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Q. Let's say someone buys a pack of cigarettes, takes the pack of cigarettes home, lights up and exposes his or her two young children every day to environmental tobacco smoke in the home. Okay?

Now, when you're analyzing the economic consequences of the smoking and the exposure to environmental tobacco smoke, you only get to count the tax paid on the pack of cigarettes once, right, because the two children aren't paying?

A. Right.

Q. Okay. But you count the -- and let's assume that the smoker contracts lung cancer and that the two children contract lung cancer. All right?

A. Why am I -- refresh my memory. Why am I counting the tax, to begin with? I'm trying to figure out what?

Q. I'm sorry. In talking earlier about the net costs of smoking to the state, you said it's not just an issue of offset by earlier death, but there's also the fact that you have the payment actually from the taxes. So I want to focus on the offset.

A. State of California didn't want to do that, but we'll do that.

Q. Okay. We'll do that. So let's assume the smoker gets cancer and his two children get cancer. All right? Have you -- are there any data that calculate the cost savings to the state of those two dead children?

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MR. KAPLAN: Incomplete hypothetical.
MS. MYLES: You're asking him are there any data out there in the world?
MR. BROOKEY: Yes.
MS. MYLES: Calls for speculation, lacks foundation.
THE WITNESS: I actually don't know.
MR. BROOKEY: Q. There are data with respect to the smoker; correct?
A. People have done studies, including myself, linking the healthcare costs of the smoker to cigarette smoking. There have been studies done assuming an environmental tobacco smoke risk of what the loss to the individuals themselves are, what the losses are. But I'm not sure if there's the kind of comprehensive study out there that you're talking about.
Q. So with respect to people who die of secondhand smoke-related illnesses, there aren't any data that perform the calculation you talked about earlier where you offset the smoking or the healthcare-related costs by the cost savings by way of reduced pension, nursing home time --
MR. MILES: Assumes facts.
MR. KAPLAN: Assumes facts.
MR. BROOKEY: Q. -- is that correct?
MS. MYLES: Also vague and ambiguous, incomplete hypothetical, lacks foundation, calls for

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speculation.

MR. BROOKEY: Q. Is that correct?

A. I did this, and it came out to under a penny a pack in terms of the medical costs. So we didn't play out all the offsets, as you characterize them.

Q. Okay. So you didn't figure out how much money the state saves when a child dies from secondhand smoke?

MR. MILES: Assumes facts.

MS. SHERIDAN: It's argumentative.

MS. MYLES: Same objections.

THE WITNESS: As I said, what we did is we calculated the medical costs. We calculated what you would consider the positive side without the negative side. And since the positive side, the medical costs, are under a penny a pack, we were done. There's no reason to keep going. It's too small a number relative to the other numbers I was calculating.

MR. BROOKEY: Q. So if I understand you, the state doesn't take any economic hit from childhood deaths caused by secondhand smoke, so there's no need to explore the offset; correct?

MR. MILES: Assumes facts.

MS. MYLES: Objection; misstates his testimony, assumes facts not in evidence.

THE WITNESS: The economic hit is a pretty broad spectrum of things. What do you mean?

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MR. BROOKEY: Q. The penny a pack.
A. Well, the penny a pack is not all economics. It's talking about the medical care costs that result from environmental tobacco smoke. This is for the nation, not for the state. This is everybody.
Q. Well, have you reached a conclusion -- let's go back to my hypothetical. And you're trying to determine the economic values here, and you're looking at the costs resulting from the health -- the healthcare costs, lost wages, and other costs that are incurred as a result of the smoking-related death of a smoker, and you add those same costs with respect to the lost lives of the two nonsmokers.
Can you come to a conclusion as to whether those costs would exceed, in combination, the savings to the state from having these three people die of a tobacco-related illness?
MR. KAPLAN: Incomplete hypothetical.
MS. MYLES: Give me the question back, please.
(Record read.)
MR. KAPLAN: Incomplete hypothetical, calls for speculation, lacks foundation.
MS. MYLES: Vague and ambiguous.
THE WITNESS: I cannot recall carrying out the study as you've outlined it.
MR. BROOKEY: Q. Now, even in your article "Secondhand Smoke: Facts and Fantasy," you mention

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the fact that there are certain nonfinancial concerns that are also relevant. And that's on page 8, the second full paragraph. Do you see that?

A. "This is not to say . . . "? That paragraph?

Q. Yes. The second sentence, "Nonfinancial concerns are also relevant."

A. Right.

Q. Now, is it fair to characterize a parent's interest in not having their child die of preventable disease a nonfinancial concern?

MS. MYLES: Objection; assumes facts not in evidence.

THE WITNESS: Parental concern with your children's survival could be a financial concern, but it's certainly an economic concern.

MR. BROOKEY: Q. It certainly is an economic concern?

A. Yes.

Q. All right. And what is the economic value to a parent of not -- a parent who smokes of not having his or her child die of lung cancer caused by the parent's secondhand smoke?

MR. MILES: Incomplete hypothetical, calls for speculation.

MS. FOE: Are you limiting those to economic factors?

MR. BROOKEY: Yes.

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MS. FOE: You know, the $180,000 it cost to raise a child or whatever?

MR. BROOKEY: Whatever, whatever the expert in this area tells me.

MR. KAPLAN: Assumes facts.

MS. MYLES: Also vague and ambiguous.

THE WITNESS: Economic models of household behavior typically assume that parents are making decisions on behalf of the children's welfare. So that would be the principal economic concern, that they would take account of the welfare effects on their children.

MR. BROOKEY: Q. Well, can you place an economic value on a parent's interest in not killing his or her child?

MS. MILES: Incomplete hypothetical, calls for speculation.

MS. MYLES: Assumes facts not in evidence.

THE WITNESS: I'm not exactly sure what you're asking me to do. What's the dollar value to me of my child not dying?

MR. BROOKEY: As a result of your behavior, yes.

MS. MYLES: Same objections.

THE WITNESS: I'm not sure economists would pose the question that way.

MR. BROOKEY: Q. Okay. So in all of your literature, when you're analyzing costs and benefits

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to society relating to secondhand smoke issues, you're not evening attempting to place a value on these types of considerations; right?

MS. MYLES: Objection; vague and ambiguous as to "these types of considerations," misstates the witness's prior testimony.

MS. SHERIDAN: Also misconstrues the articles you're referring to.

THE WITNESS: It also misconstrues my analysis, which is quite broad.

MR. BROOKEY: Q. Now, what is the economic benefit to a smoker of exposing his or her loved ones to carcinogens contained in ETS?

MS. SHERIDAN: Argumentative.

MR. KAPLAN: Assumes facts.

MS. MYLES: Vague and ambiguous.

THE WITNESS: Economists would not assign an additional economic benefit to inflicting harms above and beyond the benefits that you already derived.

MR. BROOKEY: Q. So in your earlier example of $7, that's a constant, regardless of the adverse health effects that are caused by that activity?

A. If you're willing to pay $10 for a pack, it would be your willingness to pay based on your prospective use of that pack of cigarettes. So that would possibly be $20 in other circumstances.

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Q. So you're saying that the $10 a day factors in these other considerations?

MR. KAPLAN: Vague, ambiguous.

MS. MYLES: Mischaracterizes his testimony and assumes facts not in evidence, such as that those factors need to be factored in.

THE WITNESS: The consumer's willingness to pay factors in, the consumer's valuation related to the prospective use of the product.

MR. BROOKEY: Q. Well, there aren't any data, are there, that show that the economic value to the smoker of smoking is greater for smokers who never expose others to ETS than it is for those who don't? Correct?

A. No, I haven't seen such data. There could be.

Q. And certainly you didn't rely on any of those data in preparing your declaration; is that correct?

A. That's correct.

MS. SHERIDAN: Asked and answered.

MR. BROOKEY: Q. Let's turn to page 4, paragraph 12 of your declaration. On line 5 you write, "Effective warnings are those that provide new information in a convincing manner."

Do you see that?

A. Yes.

Q. And then if you skip down to paragraph 13,

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line 16 and 17, you say, "A corollary to this new information principle is that warnings that do not have new informational content will not serve a constructive role."

Do you see that?

A. Yes.

Q. And you stand by those statements?

A. Yes.

Q. All right. Are there data suggesting that for a warning to be effective, it must provide new information?

A. Yes.

Q. And what do you mean by "new information"?

A. Information that would alter people's probabilistic beliefs.

Q. And what do you mean by "probabilistic beliefs"?

A. Their assessments of the probabilities of the adverse health outcomes associated with the product, to the extent that that's what we're talking about.

Q. Now, that seems to be a little bit Catch-22. How can you assess their probabilistic beliefs before you have actually conveyed the new information?

MR. KAPLAN: Move to strike comments of counsel.

MR. MILES: It's argumentative.

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THE WITNESS: Easily. You assess the probabilistic beliefs, you provide the information, you reassess the probabilistic beliefs.

MR. BROOKEY: Q. So you mean empirical evidence?

A. You could do it with empirical evidence, yes.

Q. But you haven't done that with respect to the proposed warnings that plaintiffs were seeking by way of their preliminary injunction; correct?

MR. MILES: Assumes that there's been disclosure of the proposed warnings that plaintiffs are seeking, assumes facts contrary to the state of the world here.

MR. KAPLAN: Perhaps if you told the witness what the warnings were you were seeking, he could answer the question.

MR. MILES: Or any of the parties, for that matter.

THE WITNESS: I haven't seen these proposed warnings.

MR. MILES: Counsel, you want to tell us right now what the proposed warnings are that plaintiffs are seeking in the case? I'm asking you again. Would you tell us what it is the plaintiffs are seeking the warnings to be, Mr. Brookey?

Mr. Todzo, I'm asking you on behalf of my client to tell us what it is that you think that the

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defendants should do as a warning. Will you tell us at this point?

MR. BROOKEY: Mr. Miles, I think I'll have the court reporter start marking every time you ask me an argumentative question on the record. I'm frankly tired of it.

But I will tell you one thing. This is what we want your clients to do: We want your clients to obey the law. All right?

You can read Proposition 65. You're one of, I think, two defense lawyers in this room who have experience with Proposition 65. You know the law. You know the regulations. You're defending your clients. That's your right. But let's not play this game.

Q. Dr. Viscusi, you testified earlier that you haven't done any independent studies in connection with your declaration; is that correct?

A. I'm not sure what you'd characterize how I spent the past month. These were like independent studies. I mean, I reviewed data, materials.

MS. SHERIDAN: Brian, I think his previous testimony was he had not conducted any independent surveys in connection with his work on this case.

MR. BROOKEY: Yeah, I think that's what I just asked.

MS. SHERIDAN: Would this be a good time to take a break? We've been going well over an hour.

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MR. BROOKEY: Do you need a break, Dr. Viscusi?

THE WITNESS: How about breaking at exactly 3:00, ten minutes?

MR. BROOKEY: All right. That's fine, unless Ms. Sheridan feels the need.

MS. SHERIDAN: Is that all right, Lynn?

MS. MYLES: Sure.

THE WITNESS: It seems to have a certain ring to it, ending at 3:00.

MR. BROOKEY: All right.

THE WITNESS: (Addressing the court reporter:) I'm glad you're getting all this down.

MR. BROOKEY: Q. It's fair to say, then, that if Proposition 65 required the defendants to provide warnings containing new information in a convincing manner, such warnings would be effective under your definition?

MR. MILES: Assumes facts.

MR. KAPLAN: Incomplete hypothetical.

MR. MILES: Calls for a legal conclusion.

THE WITNESS: It does assume legal judgments on my part. As I indicated earlier, I'm not a lawyer.

MR. BROOKEY: Q. Well, let's assume, which isn't actually an assumption, that defendants are not currently giving any Proposition 65-mandated warnings with respect to environmental tobacco smoke.

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MR. MILES: Well, Counsel, that's --

MR. BROOKEY: Q. If they started giving such warnings, that would be providing new information in a convincing manner; correct?

MR. KAPLAN: Move to strike comments of counsel.

MR. MILES: Okay. It assumes facts not in evidence, assumes facts contrary to evidence. It's argumentative.

MS. MILES: And it's vague and ambiguous, in the context of the question, what you mean by "new information."

THE WITNESS: The criteria by which I judge is also unclear.

MR. BROOKEY: Q. So you don't know whether you judge the criteria by legal standards?

A. In which case, I pass, because I'm not a lawyer.

Q. And that's outside your area of expertise, isn't it?

A. If you're asking for a legal judgment, yes.

Q. Do you believe that the risk to children posed by environmental tobacco smoke in the state of California is a minor hazard?

MR. MILES: Vague, lack of foundation, and assumes facts.

THE WITNESS: I have no idea what you mean by "minor."

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MR. BROOKEY: Q. Well, why don't we look at your declaration, page 4, paragraph 14, line 28. "If every minor hazard merits a warning, then consumers will be inundated with warnings."

Do you see that?

A. Yes.

Q. What did you mean when you used the phrase "minor hazard"?

A. Well, if you get to a very low probability of death, for example, then you'd want to warn virtually everything, because there's virtually nothing out there that's completely risk free.

Q. Now, given your definition of minor hazard, do you believe that the risks to a child posed by exposure to environmental tobacco smoke in the state of California is a minor hazard?

MS. SHERIDAN: Object to the extent it's outside of this witness's expertise.

MR. MILES: Assumes facts.

THE WITNESS: It also assumes what I'm doing here is defining minor hazard. All I'm saying is if you go low enough on the hazard spectrum, then you're going to find things that do not merit on-product warnings.

MR. BROOKEY: Q. And that's correct, you didn't do that analysis in connection with your declaration; correct?

MR. MILES: Read it back, please.

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(Record read.)
MS. SHERIDAN: Argumentative.
THE WITNESS: I don't know what the point of your question is. Either I'm losing it, or you are. Do you want to take a break now?
MR. BROOKEY: No. I can go --
THE WITNESS: I just made no sense of that.
MR. BROOKEY: Q. Well, you said if you go low enough on the hazard spectrum, then you're going to find things that do not merit on-product warnings. I'm saying I believe you testified earlier that you did not examine the hazard spectrum and determine whether any of the risks at issue in this litigation do or do not merit any specific type of warning. Am I remembering your testimony correctly?
MS. MYLES: Objection; misstates his testimony.
MR. MILES: Could you read it back. I'm really having trouble tracking this one. Slowly.
(Record read.)
MS. MYLES: Objection; compound. Objection to the form of the question. Also misstates his prior testimony.
MR. MILES: The testimony speaks for itself.
THE WITNESS: As I indicated earlier, I approach this from a hazard warning standpoint, not trying to evaluate whether the risk scientific

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evidence triggers a warnings requirement under Proposition 65, which is a legal judgment.

MR. BROOKEY: Q. And when you wrote the sentence "If every minor hazard merits a warning, then consumers will be inundated with warnings," were you aware of the fact that this lawsuit involves nonconsumers who are exposed to environmental tobacco smoke?

A. Yes.

Q. Is there any reason you focused on consumers being inundated with warnings?

A. Well, I then call it people in the next sentence.

Q. All right. If you look down a little bit more, page 5, line 4, you say, "First, people may be overly deterred from that risky activity."

Do you see that?

A. Yes.

Q. Are you talking about the people who are exposing others to carcinogens, or are you talking about the people who are being exposed?

MS. MYLES: Objection; assumes facts.

THE WITNESS: I'm talking about the people making the consumption decision.

MR. BROOKEY: Q. So, again, you're not --

A. Typically.

Q. Okay.

A. But it could be other things as well. If

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you have a situation where people think you should evacuate San Francisco if there's somebody smoking a cigarette, that would be an example where other people are overreacting, even though they're not the smoking decision maker.

Q. Well, when you say "overly deterred," are you speaking in economic terms?

A. I'm saying they're not making an efficient decision, given the magnitude of the risk.

Q. Okay. Well, let's assume that there's somebody who receives a warning that smoking or environmental tobacco smoke will increase the chances of their child dying of sudden infant death syndrome. Is it possible to overly deter that parent from smoking in the presence of that child?

MR. KAPLAN: Can I get that read back, please. I'm sorry.

(Record read.)

MR. MILES: Assumes facts and vague, incomplete hypothetical.

THE WITNESS: I'd want to review the medical evidence on this risk before starting to make pronouncements on warnings, because the warnings have to pertain to the risk.

MR. BROOKEY: Q. Well, let's assume that risk exists.

A. With what probability? 1 in a billion? I mean, you didn't really characterize this and nail

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this thing down.

Q. I said it's possible, and you're saying yes, it is, if the probability's low enough; correct?

A. I'm not sure what you mean by "possible" and what odds you're placing on that, what evidence you're using.

Q. Well, as a parent, is it possible for you -- do you think you can be overly deterred from exposing your children to carcinogens?

A. Yes. Drinking water is carcinogenic because it has chlorine in it, but yet I will still let my children drink city tap water.

Q. Okay. But you wouldn't encourage them to smoke?

MS. MYLES: Objection to the form of the question.

THE WITNESS: No, I would not encourage them to smoke.

MR. BROOKEY: Q. And what are the economic consequences of a parent being deterred from smoking inside his or her house and stepping into the backyard to smoke a cigarette?

MS. SHERIDAN: Vague and ambiguous.

MS. MYLES: Incomplete hypothetical.

THE WITNESS: I don't know if they have a backyard. I don't know if there's a snowstorm outside and they're going to get pneumonia. I would want to know more about the circumstances, also the

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characteristic of the exposure.

So if the child's on the second floor and you're in a first-floor family room with all the windows open, it could be a quite different thing than if you're in the room smoking with a baby in a crib.

MR. BROOKEY: Q. What data support your conclusion that nonsmokers overestimate the risks to themselves of secondhand smoke?

MR. KAPLAN: And from where are you reading?

MR. BROOKEY: It's paragraph 24, page 9.

THE WITNESS: Page 24?

MS. MYLES: Paragraph 24.

THE WITNESS: What line are we on?

MS. MYLES: 13.

MR. BROOKEY: Q. 13 through 15.

A. This statement is referring to data that nonsmokers overestimate the risks of smoking more than smokers do.

Q. And where would I find those data?

A. The 1985-'91 data are in my book Smoking: Making the Risky Decision. I cite here 1997 national survey data. I think some of these data are reported in my Duke Law Journal article, and the 1998 data would be in the Roper Starch survey in Massachusetts.

Q. How many of these data were obtained by way of industry-funded research?

A. Well, I think I'd want to sort of clarify

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your question.

Let's start with the 1985 data. The data themselves were gathered by audits and surveys and funded by the industry, but the research with the data and the publications based on the data received no industry funding.

The 1991 data, that survey was undertaken without the knowledge or financial support of the cigarette industry, as was the write-up. So they didn't see it until the write-up was done and it had already been sent off for publication.

The 1997 survey was patterned after my 1991 survey, and along with the 1998 survey, the cost of running the survey was paid for by cigarette industry law firms, but the analysis of the data was not.

And none of the respondents were aware that any of these studies were funded by the cigarette industry, and the survey firms are nationally known.

Q. Now, when you're talking about overestimation of risks from an economic standpoint, if a consumer overestimates a risk, what, if any, would be the economic consequences?

MR. MILES: Overly broad, calls for speculation, incomplete hypothetical.

THE WITNESS: They could make bad decisions. But I think we're also --

MR. BROOKEY: Are you ready for your break?

THE WITNESS: -- at breaktime.

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MR. BROOKEY: Okay.

(Recess taken.)

MR. BROOKEY: Why don't we go back on the record.

Dr. Viscusi, I want to ask you a couple more questions on the topic that we've been on, and then I'm going to have Mr. Todzo, who has to leave, ask just a few questions, and then we'll come back and I'll finish up.

Q. Now, in terms of the economic consequences of overestimating risk, you said one of those consequences would be that consumers could make bad decisions; correct?

A. Could be, yes.

Q. During the break, I was thinking of an example. You recall the Alar scare with respect to apples several years ago?

A. Yes.

Q. And apple consumption and the consumption of apple products dropped, didn't it, after the news broke about the Alar in apples?

A. That's correct.

Q. Would that be an example to you of an overestimation of risks that led to adverse economic consequences?

A. There are people that believe that, for adults, Alar did not pose a substantial hazard, and apples have considerable benefits. There was the

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belief by EPA that children, particularly babies, drinking a lot of apple juice might be faced with significant risks.

So it's not clear that not giving babies apple juice was an excessive reaction, but having adults boycott apples as a commodity would be an excessive reaction, given what I've been told by EPA officials.

Q. So in that case, the overestimation would have been perhaps the overestimation of the risks posed to adults rather than to young children?

A. That's correct.

Q. Okay. Now, are there other economic consequences to overestimating risk?

MS. MYLES: Objection; vague and ambiguous, overbroad.

THE WITNESS: Well, if you overestimate risks, you could make various mistakes in the things you do. There are lots of examples where you can do that.

MR. BROOKEY: Q. Well, for instance, if there were a healthful product -- take it away from Alar and apples.

If there were an otherwise healthful product that had a very minor or minuscule adverse health risk, people could be overdeterred from consuming that product and getting the benefits because of the fear of the possible harms; is that

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correct?

MR. KAPLAN: Vague, incomplete hypothetical.

MS. MYLES: Calls for speculation.

THE WITNESS: I think it's easier to answer in concrete terms. If, for example, people are afraid to eat vegetables because they think there are pesticide residues and, instead, think they should eat only marbled red meat, then I think that would not be a wise decision.

MR. BROOKEY: Q. Now, given this theory of overestimation, is there any relationship between the overestimation of a risk posed by a product and the consumption of that product?

MS. MYLES: Could you read the question back, please.

(Record read.)

MS. MYLES: Objection; vague and ambiguous, calls for speculation, overbroad.

THE WITNESS: And it also depends on what's going on with other products. So if you have a situation where you think everything is risky, you may just throw up your hands. And it's hard to predict the effects.

MR. BROOKEY: Q. Well, let's talk about the risks of smoking for a moment. Is there a negative correlation between overestimating the risk posed by smoking and engaging in the act of smoking?

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MS. MYLES: Objection; vague and ambiguous.
THE WITNESS: There could be adverse effects.
MR. BROOKEY: Q. Is it safe to assume that the more a person overestimates the risk of smoking, the less likely that person will be to smoke?
MR. MILES: Calls for speculation, incomplete hypothetical.
MS. MYLES: Also vague and ambiguous.
THE WITNESS: If the person's aware that they're overestimating the risk, then it's not clear what's going through their heads.
MR. BROOKEY: Q. So the answer is not necessarily?
MR. MILES: Same objections.
THE WITNESS: I'm just asking what's exactly going through their heads.
MR. BROOKEY: Q. Well, when you say that one of the dangers of overestimating risk is being overly deterred from an activity, there are no data that actually support that kind of correlation?
MR. MILES: Vague.
MS. MYLES: Is there a question? Could you read the question back.
(Record read.)
MS. MYLES: There's no question pending.
THE WITNESS: That's right, there's no question.

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MR. BROOKEY: There is a question. We can go -- I can -- we can argue over form all we want.

Q. Well, when you say that one of the dangers of overestimating risk is being overly deterred from an activity, are there data that actually support that kind of correlation?

A. I have data that support a correlation between risk beliefs and smoking behavior.

Q. And what do those data suggest?

A. The higher the risk belief, the less likely you are to smoke.

Q. And does it follow that the higher the overestimation of risk, the less likely you are to smoke?

MS. MYLES: Objection; vague and ambiguous. Does it follow from the data, or does it follow logically?

MR. BROOKEY: Does it follow from the data.

THE WITNESS: If it's overestimation in terms of where their beliefs end up, then it deters smoking; but if they're aware they're overestimating, I'm not sure what's going on in people's heads then.

MR. BROOKEY: Let me try it one more time; then I'll turn the floor over to Mr. Todzo for a few moments.

Q. Based on these data, is it fair to say that the higher the risk perception, the less smoking there will be?

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MR. KAPLAN: Asked and answered.
MS. FOE: Can I just ask, do you mean over the population?
MR. BROOKEY: Yes.
MS. FOE: Or -- not an individual smoker who decides to commit suicide?
MR. BROOKEY: Whatever the data he was referring to suggest.
THE WITNESS: For the average smokers, when their risk beliefs go up, the propensity to smoke goes down.
MR. BROOKEY: Thank you. I'll take a break now and let Mr. Todzo ask some questions.
EXAMINATION BY MR. TODZO
MR. TODZO: Q. Good afternoon, Dr. Viscusi. I only have a few questions for you.
Q. Looking at paragraph 19 of your declaration, there is a particular Prop 65 warning campaign that's described.
A. Okay.
Q. Now, just looking at that, at the description of that campaign, in your opinion, is that an -- does that constitute an effective warning campaign?
MR. KAPLAN: Vague and ambiguous.
MS. MYLES: Lacks foundation.
THE WITNESS: I'm not sure the criterion by which I'm judging this.

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MR. TODZO: Q. I'm looking at when -- the criteria would be the criteria that you describe in paragraph 12 of your declaration, and specifically where you say, "Effective warnings are those that provide new information in a convincing manner."

A. Well, that's different than a legal requirement.

Q. I'm not asking you about a legal requirement. I'm asking you: In your opinion, as you describe -- and you do describe -- my understanding is that you are an expert in terms of what is an effective warning campaign, not a legally sufficient warning campaign.

So my question to you then is: The warning program described in paragraph 19, in your opinion, is that an effective warning campaign?

A. I do not know whether before given this warning, whether all Californians already believed that tobacco smoke is known to cause cancer.

Q. Okay. Why don't we turn to, I think it was, paragraph 16. You discuss that in 1964 and on an annual basis beginning in 1967 the U.S. Surgeon General issued reports on the hazards of smoking, including involuntary smoking through environmental tobacco smoke.

So looking at your declaration, it appears that that information had already been conveyed to the public regarding the hazards of environmental tobacco

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smoke long before 1989. Would that be correct?

A. Some information, yes.

Q. So considering that some information relating to the hazards of environmental tobacco smoke had been provided to the public prior to 1989, what new information was conveyed in the 1989 campaign referenced in paragraph 19 of your declaration?

MS. MYLES: Objection; lacks foundation, calls for speculation.

THE WITNESS: I don't think I have precise evidence on this particular question in terms of survey data right before 1989. There's some data on risk beliefs over time, but I'm not sure it's exactly worded this way. So I'd have to see that evidence before I concluded exactly what the information really was.

MR. TODZO: Q. Let's assume that the warning campaign that was undertaken as described in paragraph 19 were undertaken today. Would that constitute an effective warning campaign, in your opinion, under the criteria described in your paragraph 12?

A. Well, in part because of this and everything else that's gone on, I think there's universal receipt of this message already. So you don't need additional provision of this information if it's already been received.

Q. So then the answer -- I'm just trying to

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get -- so then the specific answer would be no, this would not be an effective warning campaign under the criteria in paragraph 12?

MS. MYLES: Objection; vague and ambiguous as to whether your question assumes that the campaign described in paragraph 19 had, in fact, taken place in 1989. I assume that the answer to that is yes; right?

MR. TODZO: I'm assuming regardless of whether that actually did take place in 1989. Given the survey data that you've described, I don't think that necessarily matters then whether or not a particular campaign was endeavored in 1989.

Q. So just assuming the state of public knowledge as it is today, were this campaign undertaken, would it constitute an effective warning campaign?

MR. MILES: Well, vague when you use the word "effective." Are you defining effective as changing the percentage of people that are aware of BTS?

MS. SHERIDAN: Is that an earthquake?

MR. BROOKEY: Welcome to California.

THE WITNESS: Is this the Taiwan aftershock?

MS. MYLES: I think there needs to be clarity on that point in your question, not just the point Mr. Miles is raising. I think both points need clarity. Your question seems to assume that the 1989

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campaign took place. Then we're saying --

THE WITNESS: We --

MS. MYLES: Because it says "in the existing state of public knowledge," which presumably many includes that campaign.

MS. SHERIDAN: Not part of this prior response.

MS. MYLES: I want to make sure that's a correct understanding of your question.

MR. TODZO: Q. I don't think it's relevant, but let's assume that that is -- that that is a prerequisite or premise of my question. Assume that the 1969 campaign did occur and that the state of public knowledge is where it is today.

Would the campaign described in paragraph 19 constitute an effective warning campaign? And that's, again, using your description of what an effective warning is.

A. If there are this universal receipt of the warning already that tobacco smoke is known to the State of California to cause cancer, which is another premise of my response, then you can declare victory and you don't have to keep on providing this message.

Q. Dr. Viscusi, that seems to be a pretty consistent theme, that where people have -- with your work and in your declaration, that where people have knowledge, no further warnings are required. Is that an accurate assessment?

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MS. SHERIDAN: I think "effective" would be a better word than "required."

MS. MYLES: Also overbroad, misstates or overgeneralizes with respect to the prior writings.

THE WITNESS: I think it is too broad in that the premise is not necessarily that people know everything, they just know this one particular fact. So are you talking about warning about other things or warning about this one particular linkage?

MR. TODZO: Q. I'm talking about warnings regarding environmental tobacco smoke. You're stating --

A. And cancer? Telling people that environmental tobacco smoke is known to cause cancer?

Q. Sure.

A. If people already say, "Yes, I've heard that," understand having received that message, you don't have to keep on telling them the same thing.

Q. Now, let's assume that all efforts are halted in terms of providing that message because let's say the policymakers agree with your premise that no further warnings are required or necessary, given a high state of public awareness of the risk of environmental tobacco smoke.

What then happens with people who just move into the state? How are they conveyed that message?

MR. MILES: Incomplete hypothetical, calls for speculation.

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MS. MYLES: Assumes facts not in evidence.

THE WITNESS: Well, now we're changing the original premise, which is that a hundred percent allegedly know.

If you look at the Lexus article counts on cigarette smoke, I think you'll find that the coverage of tobacco smoking nationwide has gone through the roof in the 1990s. So this is not something that is a California-specific thing. So I don't think you can assume complete ignorance for the new entrants either.

MR. TODZO: Q. Earlier -- there have been a couple of times today where you've spoken about this vast awareness regarding the hazards of ETS; and in one instance you talked about -- you specifically spoke about how there were a number of different campaigns that have led to this -- or have basically resulted in this vast public awareness; and then at a later time you said specifically that as a result of the signs that were sent out in 1989, there was a vast public awareness. I just want a little clarification.

What specifically -- where do you -- where do you suppose that the vast public awareness that you've alluded to has arisen? As a result of what efforts?

MS. MYLES: Objection; compound.

THE WITNESS: A variety of things happened concurrently, and from a statistical standpoint, you can't disentangle them. I think they're all

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interdependent.

You have warnings being posted in hundreds of thousands of locations throughout California. This stimulates press interest. You have Proposition 99, and you have the tax on cigarettes that contributes to reams of educational materials, media broadcasts.

I don't think you can isolate one particular informational effort and say that did it, because there's too many things happening. But I think they're all part of this massive effort in which the tobacco industry has played an instrumental role.

MR. TODZO: Q. But you have no specific data that the circulation or facilitation of the circulation of warning signs has produced a specific level of awareness in Californians; is that correct?

MR. MILES: Vague.

THE WITNESS: As I said, we can't break out any specific thing, whether it's warning signs, billboards, TV ads. We know that the whole set of information that's been conveyed has increased our risk beliefs, and it's essentially hitting up against ceiling effects in terms of how far you can go.

MR. TODZO: Q. Earlier today you spoke of a, quote, well-defined metric. Could you just describe that concept again?

A. A well-defined metric would be: Out of 100 smokers, how many of them do you think will get lung cancer because they smoke? And if you said 20, I said

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10; your answer would be twice as big as mine.

A not well-defined metric would be how tall are the different people in this room? So we have the tallest person, we have the second tallest person, but you can't say the tallest person is twice as tall as the second tallest person because that's not a quantitative metric. That's a qualitative ranking. Whereas, I can say 20 is twice as big as 10.

Q. Would you consider the question "Is secondhand" -- and I'm quoting -- "Is secondhand smoke bad for your health" to be a well-defined metric for whether an individual believes that secondhand smoke is known to the state to cause cancer?

A. Well, neither of those statements involves a quantitative metric. So you don't test a qualitative belief on the part of the State of California with a quantitative question, because it's not a quantitative statement of their knowledge. They just say that it causes cancer. They didn't say with what probability. So you can't link this up to a quantitative metric. There's no quantitative analog that matches up to it.

Q. Okay. What about from a nonquantitative metric standpoint? Does the question "Is secondhand smoke bad for your health," is that reflective of a -- of an individual's knowledge, or is that reflective of whether an individual believes that secondhand smoke is known to cause cancer?

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MS. MYLES: Can you read the question back, please.

THE WITNESS: I'd also like to see the exact wording that we're comparing.

MR. TODZO: Q. Oh, I'm sorry. I'm looking at paragraph 26 of your declaration, where -- this is I believe -- okay -- line 1 of page 11, where it's talking about a percentage of the populace that believes that, quote, secondhand smoke is bad for your health.

And so my question is: Is that percentage reflective of the percentage of people who think -- in California who think that secondhand smoke is known to cause cancer?

A. The wording's not exactly the same. But if you ask people what health outcomes you associate with the adverse health consequences of smoking and is cancer among them, I think you'll find that cancer is way up there in terms of what they will list.

Q. Can you cite to some specific data that backs up that statement?

A. I haven't seen any data where people have to reject that. I've seen data on open-ended memory recall tests, like "What is the most important risk of smoking," and lung cancer and cancer combined is the most important one. That was out of Canada, but I forget the name of the study.

Q. What about birth defects and other

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reproductive harm in that same vein?

MS. MYLES: Objection to the form of the question; vague and ambiguous. What do you mean "what about birth defects"? Are you referring to ETS?

MR. TODZO: Specifically, Dr. Viscusi testified that in these memory recall tests, that lung cancer and cancer were described as the most important health effects resulting from exposure to ETS.

Q. I'm wondering where birth defects and other reproductive harm rank on that same scale.

MS. MYLES: Objection; assumes facts not in evidence.

THE WITNESS: I don't recall. And also, open-ended memory recall tests don't necessarily give ranking. But it's noteworthy that 95.4 percent believe that ETS harms the health of babies and children.

MR. TODZO: Q. Now, that specific statement that you're -- and I believe you're reading from paragraph 26 of your declaration; is that correct?

A. That's correct.

Q. That data comes from a single paper; is that correct?

A. Well, it's a survey by the California Department of Health Services.

Q. Do you know how many people were surveyed?

A. No. I know they did a preliminary survey.

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I think then they came out half year; then they had the end-of-the-year report. And the results were stable across both, but I forget the exact sample size.

Q. I'm going to give you a hypothetical now. Let's assume that there is a product that's used in homes of Californians, and it's used in the homes of 3 million Californians, and those specific -- that group of 3 million cuts across both racial lines as well as socioeconomic lines.

Now, let's further assume that this particular product is subsequently -- this is after purchase of the product -- it's subsequently found to release a specific -- a gas that is a known carcinogen.

How would you effectively communicate a warning relating to that hazard to those 3 million individuals in California?

MR. MILES: Incomplete hypothetical, assumes facts.

MR. KAPLAN: Vague as to "known carcinogen."

THE WITNESS: People don't just wing warnings approaches on the spot. So, for example, when I did it for one product, I studied how people use the product. I studied the product, studied the product risks, studied the language that they use for that product and for other products. So it's not

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something that I do off the cuff.

So I'm not going to design a warning system for this hypothetical product on the spot.

MR. TODZO: Q. How would you communicate a risk to a large number of individuals outside the realm of the product sale? You're assuming, I think, in your answer that you need to devise this warning program in conjunction with the sale of the product. And what I'm saying is that the hazard has arisen subsequent to the sale. So you're not devising a warning program now in my hypothetical with regard to the actual sale of the product. It's a -- I'm asking you to devise a means of transferring or transmitting a warning to a large number of people subsequent to the purchase or sale of that product.

MS. MYLES: There's no question pending.

MR. TODZO: This relates back to my prior hypothetical.

MR. MILES: The question is argumentative.

MS. MYLES: You need to pose a new question.

MR. MILES: It's argumentative, and it's an incomplete hypothetical.

MS. MYLES: The witness has already answered your prior question, and you need to ask a new question. That speech was not a question. And it was also -- to the extent it could be viewed as a question, it was compound in several respects.

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MR. TODZO: Well, I think there is a question pending, because I have refined my hypothetical with my subsequent statement.

Q. So, Dr. Viscusi, if you could answer it, you certainly may.

MS. MYLES: There's no question pending. He's answered your prior question.

THE WITNESS: I can't remember a question.

MR. TODZO: Q. With regard to Prop 65 warnings, you have testified that in some instances you believe on-product warnings to be effective and in other situations you believe that an on-product warning is not -- is not called for.

Could you describe a situation in which an on-product warning is an effective warning?

MS. MYLES: Objection; calls for speculation.

THE WITNESS: Hazardous chemicals. On-product warnings in the workplace, for example, with respect to very potent industrial chemicals are often effective.

MR. TODZO: Q. What do you believe is an effective means of transmitting a warning for an air contaminant?

MS. MYLES: Objection; incomplete hypothetical, calls for speculation, lacks foundation.

MR. MILES: Join.

THE WITNESS: It depends on the risk and

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the context whether you'd even want to provide a warning.

MR. TODZO: Q. Let's assume that you do want to provide a warning. How would you -- what would you think is an effective means of transmitting a warning with regard to an air contaminant?

MS. MYLES: Same objections.

MS. SHERIDAN: And he already said it would depend on the context, and you haven't given him that. So it's an incomplete hypothetical.

THE WITNESS: I don't know where the contaminant came from.

MR. TODZO: I think that's it for me.

CONTINUED EXAMINATION BY MR. BROOKEY

MR. BROOKEY: Dr. Viscusi, I want to ask some for questions to you regarding paragraph 26.

Q. Now, these data are all snapshot data, are they not? There aren't any longitudinal studies?

MS. MYLES: Objection; compound, vague and ambiguous as to "these data."

THE WITNESS: I believe some of these data were drawn from studies that did track numbers over time, not necessarily longitudinal by individual, but series of cross sections over time that purport to be representative of California.

MR. BROOKEY: Q. Do you know how large the sample sizes were for any of these studies?

MS. MYLES: Objection; vague and ambiguous.

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THE WITNESS: No, but I'd like to think that California Department of Health Services would want to have reliable studies, and these are their studies.

MR. BROOKEY: Q. Now, going back to the issue of knowledge that environmental tobacco smoke causes lung cancer, ETS has been associated with other types of cancers, has it not?

MS. MYLES: Could you read the question back.

(Record read.)

MS. MYLES: Objection.

MR. MILES: Object to the form of the question. It's assuming facts and argumentative.

THE WITNESS: I really don't like the use of the word "associated."

MR. BROOKEY: Q. We can use caused.

A. I've seen no studies indicating a statistically significant effect of ETS exposures in normal environments on any types of cancer when judged using the conventional 95 percent confidence levels.

Q. Well, let's assume that there are data showing such a statistically significant effect.

MR. KAPLAN: Assumes facts.

THE WITNESS: Let's assume some facts that don't exist? Do you have the studies with you? Can you give me a cite?

MR. BROOKEY: Q. I'm giving you a

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hypothetical.

A. So it's not a fact.

Q. Well, ETS is -- okay. Let me ask this: It is a fact, is it not, that environmental tobacco smoke is known to the State of California to cause cancer? That's a fact, isn't it?

MR. MILES: Hang on a second.

MS. MYLES: Calls for a legal conclusion.

MR. MILES: It's vague and ambiguous whether you're asking him to comment on whether it's been listed under the statute.

MR. BROOKEY: Mr. Miles --

MS. MYLES: Will you let him finish?

MR. BROOKEY: No. He coaches the witnesses every time I ask this question, and I'm tired of it. It is a fact.

MS. MYLES: It's an inappropriate question.

MR. MILES: Counsel, I'm entitled to make an objection.

MR. BROOKEY: You're not entitled to continue telling the witnesses what to say.

MS. MYLES: He's not doing that.

MR. MILES: If your question's ambiguous --

MR. BROOKEY: I have other --

MR. MILES: -- I'm entitled to make the objection.

MR. BROOKEY: I have Monday's transcript on my computer. Do you want me to find the times you

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told Mr. Sanders what to say?

MR. MILES: I never told Mr. Sanders what to say, and I deeply resent your statement to that effect on this record.

(Mr. Todzo leaves the proceedings.)

MR. BROOKEY: You certainly told him what not to say. I'll withdraw the question that's causing so much controversy.

Q. You do understand that for purposes of Proposition 65, environmental tobacco smoke is known to the State of California to cause cancer; correct?

MS. MYLES: Objection; calls for a legal conclusion.

THE WITNESS: I don't know what that means. Or if you're asking me from a scientific standpoint, I don't know exactly what they did. I know what the sentence means and how this has become an official policy position, but I don't know what scientific evidence underlies this conclusion.

MR. BROOKEY: Q. You do understand that for purposes of Proposition 65, environmental tobacco smoke is listed as a known carcinogen; correct?

MS. MYLES: Objection; calls for a legal conclusion. The statute speaks for itself.

THE WITNESS: I have heard that it's listed. Whether it's an appropriate listing or not, I don't know.

MR. BROOKEY: Q. And you do understand

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that for purposes of Proposition 65, certain constituent chemicals of environmental tobacco smoke are listed as known reproductive toxicants; correct?

MR. KAPLAN: Same objections.

MS. MYLES: Same objections.

THE WITNESS: I've not independently verified that these chemicals are part of environmental tobacco smoke at levels that would require listing, but I've heard that they've listed environmental tobacco smoke and constituent chemicals.

MR. BROOKEY: Q. All right. Now, are there any data that indicate the level of awareness among Californians in 1999 that environmental tobacco smoke is known to the State of California to cause cancer?

MR. MILES: Assumes facts.

MR. KAPLAN: Vague.

THE WITNESS: I don't understand the reference point. The reference point is not a level of awareness, it's a qualitative statement.

MR. BROOKEY: Q. I see. So it doesn't matter whether they get the message that ETS is known to the state to cause canner?

MR. MILES: Vague, assumes facts.

MR. KAPLAN: Argumentative.

THE WITNESS: That's not a level issue. That's: Have you heard, you know, that the sky is blue? So, you know, it's not saying that it's very

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deep blue or how carcinogenic it is.

MR. BROOKEY: Q. Dr. Viscusi, I'm talking about the fact that the State of California, as an entity, knows that environmental tobacco smoke is a carcinogen. Are there any --

MR. MILES: Vague and ambiguous, and it's argumentative.

MR. BROOKEY: Q. Are there any data that suggest Californians are aware of that fact, the specific corporeal knowledge of the State of California as to the carcinogenicity of ETS?

MS. MYLES: Objection; vague and ambiguous, assumes facts.

THE WITNESS: I would think this would be a very strange question to ask in a survey, since people don't think of the State of California as an entity. They're part of it.

MR. BROOKEY: Q. Oh, so it would be a -- it would be news to them to think of the state as an entity?

MR. MILES: Argumentative.

THE WITNESS: If you see it in a sign, you know that they're referring to the state government.

MR. BROOKEY: Q. How do you know that?

A. Well, it looks like an official sign that's a government-type mandated sign just like it's posted for fair employment practices in certain places.

Q. Now, you said you've never seen any of

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those in the state of California.

A. Sure, I have.

MR. KAPLAN: Misstates testimony.

MR. BROOKEY: Q. Oh, all right. What are the data and where are the data that suggest that Californians know the source of any signs in the state warning of the carcinogenicity of ETS?

A. I don't think I have data indicating whether people knew which particular entity put the sign up.

Q. And the same with respect to media advertisements, radio and television? Where are the data that suggest that people pay attention to the source of those advertisements?

A. Well, the source is indicated on many of the ads. So I would assume that people would process that information along with the ad.

Q. On what do you base that assumption?

A. Because it's part of many of the ads from the Department of Health Services.

Q. But there are no data that say when Californians see a television commercial, they read the script at the bottom of the page referring to the state; correct?

MS. MYLES: Objection; misstates his testimony.

MR. KAPLAN: Assumes that it's written text as opposed to oral text.

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THE WITNESS: Once again, I have not seen specific data on any of these mechanisms relating to people's knowledge of the source of the warning.

MR. BROOKEY: Q. And if the source is on a television and it's in writing, there are no data to suggest the number of people who have the television on in the background and hear the message but don't see the writing --

MR. KAPLAN: Incomplete hypothetical.

MR. BROOKEY: Q. -- correct?

MR. MILES: Could you read the question back, please.

(Record read.)

THE WITNESS: Well, I don't have these data. The data I'm sure exists as to whether people are watching TV or not watching TV, because marketing people care about this sort of thing. So I wouldn't rule out the possibility of there being data on this.

MR. BROOKEY: Q. And if we flip that around, it's possible that some people are watching television and the phone rings and they hit the mute button and they may see an advertisement or a Prop 99 advertisement relating to ETS and not hear the information on the ad; correct?

MR. MILES: Calls for speculation.

THE WITNESS: You could invent hypotheticals like that. You could also invent hypotheticals of people who would not be recorded as

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watching TV but walk by the TV after getting off the phone, hear the ad and see the message.

MR. BROOKEY: Q. Right. So let's assume that people in California have a high level of awareness that somebody is putting out information that ETS causes cancer, and let's assume that none of those people knows that the source of that information is the State of California.

A warning campaign that says, "You know what? Not only does ETS cause cancer, but this is a known fact to the State of California," that would be new information, wouldn't it, to those people?

MR. KAPLAN: Can I get that question read back, please.

MR. BROOKEY: I'm sorry. I was a little distracted by the whispering.

(Record read.)

MR. KAPLAN: Incomplete hypothetical, assumes facts, vague, ambiguous, calls for speculation.

MR. MILES: Join.

THE WITNESS: It assumes away the facts, which is that the posted warnings did mention the State of California.

But more importantly, when you say "new information," if you're using it in the context which I've used it, is that this information is going to alter risk beliefs, whereas they were not altered

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before, I have no reason to believe that seeing the ad, let's say, on TV would but not processing that it came from the Department of Health Services will affect risk beliefs.

MR. BROOKEY: Q. Could you answer my question, please. It would be new information that people otherwise hadn't heard that ETS is known to the State of California to cause cancer and they have never received that message?

MS. SHERIDAN: Brian, he did answer your question.

MR. BROOKEY: I don't believe so. I think he said that assumes away everything. I'm asking him a hypothetical. I'm allowed to do that.

MS. SHERIDAN: He explained the significance of what he meant by "new information" in his declaration.

THE WITNESS: There's two parts to my answer.

MR. BROOKEY: Q. And you don't think that the source of information affects the credibility and, therefore, the perception of risk on behalf of the recipients?

MR. MILES: Compound and complex.

THE WITNESS: I never talked about the source of the information affecting credibility.

MR. BROOKEY: Q. So that's not a part of your expert analysis in this case?

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A. It was not part of my previous answer.
Q. And that was not part of your expert testimony, correct, in your declaration?
MS. MYLES: Objection; vague and ambiguous, overbroad.
THE WITNESS: It did enter with respect to certain studies that I mentioned.
MR. BROOKEY: Q. Which ones?
A. The alarmist responses study, for example, and Learning About Risk, it comes up in that book.
Q. And yet you're saying that the source of information that ETS is a carcinogen is not the type of new information, as you use it, that is an element of an effective warning?
A. We don't know how that would alter risk beliefs. So I've had situations where you have the government providing information, I've had industry providing information, and you could end up in the same place, whether it's the government or the industry. So we don't know that this is going to alter risk beliefs.
Q. Thank you. Now, the study that said that by 1995, 95.4 percent of nonsmokers believed that ETS harmed the health of babies and children, again, those data do not refer at all to birth defects; correct?
A. Harming the health of babies could include birth defects.
Q. But you don't know that's true; correct?

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MS. MYLES: Objection; vague and ambiguous as to what you mean by "that's true."

MR. MILES: What you include within the definition of him knowing, what he's referring to.

MR. BROOKEY: Q. You're basic -- I mean, you're guessing that that may include birth defects; correct?

A. I've seen from other studies that birth defects are very high on the list of perceived health hazards of environmental tobacco smoke. So I'd assume that this is what it's picking up, one of the effects.

Q. Are any of those studies cited in your declaration?

A. No.

Q. Why not?

A. Well, the main study's for Spain, so I didn't know if Spanish data was pertinent. But I didn't know we were going to be getting into interpretations of what people were thinking about.

Q. And assuming that these people, these 95.4 percent, were referring to postnatal harm and had no knowledge that secondhand smoke causes or chemicals contained in secondhand smoke cause birth defects, that would certainly be new information, wouldn't it?

MR. MILES: Assumes facts, incomplete hypothetical, calls for speculation.

THE WITNESS: We don't know that's new information till we know how people answer the

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question: Does ETS cause birth defects?

The fact that when they answered this question they were thinking of postnatal harm doesn't tell me anything about what they're thinking about prenatal harm if you're excluding that from this answer. So that's just a separate thing you'd want to gather information on.

MR. BROOKEY: Q. And you haven't gathered information on that?

MS. MYLES: Personally?

MR. BROOKEY: Personally.

MR. MILES: That assumes that it's not included in the information he's pointing to, which is an assumption contrary to his prior testimony.

THE WITNESS: And based on my reading of the literature, including the study of risk perceptions in Spain, I would conclude that this is very much on people's mind. This is for a country that has less publicity regarding smoking than the United States.

MR. BROOKEY: Q. There are no data regarding the beliefs of Californians as to the increased chance of birth defects resulting from exposure to chemicals in environmental tobacco smoke; correct?

MR. MILES: Could you read that back, please.

(Record read.)

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MR. MILES: Vague, ambiguous.

MR. KAPLAN: Asked and answered.

THE WITNESS: Your question seems to ask for a quantitative assessment of people's perceptions, and what we have here is a qualitative judgment regarding the health of babies and children. And it's my understanding the focus of Proposition 65 is on qualitative ratings and qualitative understandings.

MR. BROOKEY: Q. And you have no idea what harm to the health of babies and children means in terms of the types of harm; correct?

MR. MILES: Could you read it back, please.

(Record read.)

MS. MYLES: Objection; overbroad.

THE WITNESS: I've already discussed the fact that in other studies, birth defects are included in this. But it's noteworthy that this is a statement that they believe that ETS harms the health of babies, not might harm, might have some low probability of harming, actually harms the health of babies and children. So I regard this as an extremely strong response.

MR. BROOKEY: Q. And you have no idea what harm to the health of babies and children means in terms of the types of harm reflected here; correct?

MR. MILES: That's the same --

MS. SHERIDAN: Asked and answered.

MR. MILES: Asked and answered.

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MR. BROOKEY: It's asked and unanswered.
MS. MYLES: Overbroad.
THE WITNESS: I'll stick with my previous answers.
MR. BROOKEY: Q. Okay. Let me ask it this way: Of these 95.4 percent, according to the published data, how many of them believed that ETS caused birth defects?
A. I don't know the exact number.
Q. Do you have an estimate?
A. I haven't prepared one.
Q. How many of that 95.4 percent believe that ETS exacerbated asthma?
A. I'm not sure asthma was covered under Proposition 65.
Q. How many of this 95.4 percent believe that ETS caused or exacerbated ear infections?
A. The same response.
MR. MILES: Assumes facts.
THE WITNESS: And I don't know that ETS causes ear infections.
MR. BROOKEY: Q. Are you aware that that's a standard question that pediatricians ask when you take your child to the doctor with an ear infection, is whether there's a smoker in the home?
Please let me finish asking my question, Mr. Miles.
MR. MILES: Are you finished?

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MR. BROOKEY: Yes. Now you may object.
MR. MILES: Assumes facts.
THE WITNESS: And once again, we get into this causality debate.
MR. MILES: Counsel, are you prepared to stipulate to the fact that you're assuming in your question, which is every doctor always asks as a matter of routine about environmental tobacco smoke in any instance where there's an indication of an ear infection on the part of a child? Will you stipulate to that fact or not? If you won't stipulate to it, then my objection's a good one. If you'll stipulate to the fact, then I'll consider withdrawing my objection.
MR. BROOKEY: Would you mind marking every time that Mr. Miles asks me a question during the deposition of the witness?
MR. MILES: And one of the efforts that will take you very little effort, will you mark every time that he actually responds to one of my questions? Consider it a labor-saving device on your part.
MR. BROOKEY: Q. Dr. Viscusi, let's assume that of this 95.4 percent, 99 percent who responded that ETS harmed the health of babies and children were not thinking of birth defects and were thinking of ear infections. All right?
Now, if we tell that group of people that ETS also causes birth defects, that would be new

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information, wouldn't it?

MR. MILES: Assumes facts not in evidence.

MR. KAPLAN: Assumes facts.

MS. MYLES: Incomplete hypothetical.

THE WITNESS: And to add to that, the fact that 99 percent were thinking of ear infections when answering this question does not imply that the same percentage wouldn't have also said 95.4 percent if you'd said birth defects. And if that's the case, there's no new information.

MR. BROOKEY: Q. But you have no idea one way are the other; correct?

A. I didn't say that.

Q. So you can't offer an expert opinion as to whether conveying to Californians that chemicals in ETS cause birth defects -- causes birth defects --

MR. KAPLAN: Calls for a --

MR. BROOKEY: Q. -- cause birth defects --

Excuse me. Can I finish my question, please? Let me start over.

MR. KAPLAN: Okay. I'm sorry.

MR. BROOKEY: Q. You cannot offer an expert opinion as to whether conveying to Californians that chemicals in ETS cause birth defects specifically is new information; correct?

MR. KAPLAN: Calls for a legal conclusion.

MR. MILES: And an incomplete hypothetical, also vague.

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THE WITNESS: I have no evidence to believe that that would be new information.

MR. BROOKEY: Q. But you also have no evidence to believe that it wouldn't; correct?

A. No.

Q. No, because you're drawing the assumptions from the 95.4 percent?

A. As well as the salience of birth defect perceptions in other studies.

Q. Now, let's assume -- let's assume that this 95.4 percent stated they believe that ETS did cause birth defects. All right? Now, what was done to make sure that people understood that in that context, ETS, or secondhand smoke, did not mean smoke inhaled by a pregnant woman that may have been secondhand smoke to the unborn child?

MR. MILES: Could you read the question back.

(Record read.)

THE WITNESS: That question's a mess.

MR. KAPLAN: Objection; unintelligible.

MR. BROOKEY: It is?

THE WITNESS: I don't understand it.

MS. MYLES: It is.

MR. BROOKEY: Q. All right. Secondhand -- it's conceivable, isn't it, that -- no pun intended with "conceivable" -- that if you ask someone, "Is secondhand smoke dangerous to an unborn child," that

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there are two possible interpretations of that question? One being secondhand smoke means someone other than the pregnant woman, that she inhales secondhand, and another interpretation would be as far as the unborn child is concerned, it's secondhand smoke because the child's not smoking but the pregnant mother is. Correct?

A. I don't think so. That's not the way I think of it.

Q. I understand that, Dr. Viscusi, but you're an expert witness. I'm asking about the Californians in this study. Isn't it possible that some of them misconstrued ETS as smoke that was inhaled by a pregnant mother when they responded to questions, if they responded to questions, regarding prenatal exposure?

MR. MILES: Calls for speculation.

MR. KAPLAN: Incomplete hypothetical, assumes facts.

THE WITNESS: And it's also not environmental tobacco smoke. It's smoking by the pregnant mother. That's a different question.

MR. BROOKEY: Q. Was the term "environmental tobacco smoke" used or was the term secondhand smoke used?

A. I'd have to look at the survey, which I may have with me. Do you want to take a break?

Q. No. It's up to you. But as you sit here

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right now, you don't know; right?

A. I don't remember.

Q. All right.

MS. MYLES: I assume, Brian, your last question, you meant as you sit here today, you don't know whether the study referred to secondhand smoke or ETS?

MR. BROOKEY: That's correct.

Q. Let's assume that of this 95.4 percent, some percentage of that involved prenatal exposure to secondhand smoke and was dealing with birth defects. We don't know what the percentage is. And let's assume that of that percentage, some or most interpreted that as secondhand smoke, meaning someone smoking other than the pregnant mother.

That would still leave some percentage of the population to whom a warning that secondhand smoke contains chemicals known to the State of California to cause birth defects would be new information; correct?

MR. MILES: It's complex, argumentative, assumes facts.

MS. FOE: Could we hear the question again.

(Record read.)

MR. KAPLAN: Compound.

MR. MILES: It's an incomplete hypothetical.

THE WITNESS: It's unintelligible to me. And I should note it is late in the day too, so --

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MR. BROOKEY: Yeah. Let's make --
THE WITNESS: -- perhaps one of us is not being as crisp as we'd like.
MR. BROOKEY: Well, I'm having a hard time following this analysis. So maybe it's my problem.
Q. Let's try it very simply. If 95.4 percent believe that ETS harmed the health of babies and children, that's 4.6 percent who don't have that belief; correct?
A. Who don't believe that it's harm in the nonprobabilistic sense, which is what this question pertains to.
Q. And you don't know whether that's because they haven't received the warning message or because they didn't believe the warning message; correct?
MR. KAPLAN: Argumentative.
THE WITNESS: No, I don't know either one of those things. It also could be people that believe that there is a possibility of harm but do not believe that it definitely always harms the health of babies and children.
MR. BROOKEY: Q. All right. Do you believe that environmental tobacco smoke harms the health of babies and children?
A. In terms of 100 percent causality, no.
Q. What about in any terms?
A. I would want to know more about the extent of the exposure and the type of harm we're talking

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about.

Q. I want to follow up on something else Mr. Todzo was asking about, and that is --

MR. MILES: Before you do that, it's about 10 after 4:00. We've been going well over an hour. Would it be a convenient time to break?

MR. BROOKEY: It's fine with me.

THE WITNESS: Five-minute break?

MR. BROOKEY: Fine.

THE WITNESS: So that people don't get lost?

MR. BROOKEY: Right, that's fine.

(Recess taken.)

MR. BROOKEY: Q. Dr. Viscusi, let's assume that Prop 99 is repealed and there are no more warnings -- and I know counsel think that's a cool hypothetical, that's great. But let's assume that -- Californians are no longer warned through Prop 99 advertisements of the dangers of environmental tobacco smoke, and let's assume also that -- oh, I don't know -- some judge, maybe the one who tossed the EPA study, also tosses the terms of the master settlement agreement that required -- or that had advertising components and things like turning billboards over for antismoking messages. So now there are no warnings being given to nonsmokers of the hazards of environmental tobacco smoke.

(Ms. Corash leaves the proceedings.)

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MR. MILES: You're assuming they overturned Prop 10 and the Department of Education counteracts all of its policies so there's no education at the school?

MR. BROOKEY: Yeah.

Q. Let's assume, due to the fine lobbying efforts of the tobacco industry, everything but Prop 65 that relates to warning requirements given specifically to Californians with regard to the dangers of secondhand smoke gets tossed. All right?

MR. MILES: What are you assuming about what happens to the signs that are already up, like the one outside your building, the warnings about environmental tobacco smoke? Do you have an assumption about those too?

MR. BROOKEY: No.

Q. Let's say everything that's already up stays up and eventually gets taken down. All right? Are Californians still going to receive adequate information about the dangers of secondhand tobacco smoke?

MR. MILES: Assumes facts not in evidence.

MR. KAPLAN: Incomplete hypothetical.

MR. MILES: Calls for speculation, vague as to what you mean by "adequate." To the extent you're purporting -- may be calling for a legal conclusion, lack of foundation.

THE WITNESS: Interpreting this from a

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warning standpoint, if they've already received all this information and are aware of the stated linkage between environmental tobacco smoke and cancer, you're done for those particular people. You don't have to keep on telling them.

MR. BROOKEY: Q. You're done forever with those particular people?

A. With those particular people, assuming they know that particular statement you're worried about.

Q. Well, now, let's say same scenario, except all the billboards come down, all the signs that are up come down. All right? Does that change your answer?

A. If we're changing --

MR. MILES: Same objections. Same objections.

THE WITNESS: I would want to see what people know in Massachusetts, because essentially you're saying what if we made California like Massachusetts and we could only rely on the surgeon general and the 50,000 articles a year that are now published on cigarette smoking risks, my guess is that the incremental kick you get in California is not huge.

MR. BROOKEY: Q. So you don't think that there should be any warnings given to nonsmokers in the state of California with regard to the dangers of secondhand smoke; correct?

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MR. MILES: Well, read it back, please.

(Record read.)

MR. MILES: It's vague. It's not clear whether you're talking about in a hypothetical situation or otherwise. It's not clear which of the two hypothetical situations you're talking about. To the extent that you're purporting to call for a legal conclusion, there's a lack of foundation.

THE WITNESS: I don't want to give an answer that suggests that I want to disenfranchise the California voters and deny them the right to make policy. But if we assume that there are no policies on the books, I'm happy with whatever information we provide being national. So I see no reason why we have to tell people in California something different than what we tell people in Massachusetts.

MR. BROOKEY: Q. Now, let's assume that all the California-specific laws again are repealed and the master system agreement, at least as it affects California, is repealed and all you're left with is Prop 65. All right?

I don't know if you've had a chance to see any of the billboards that are currently posted in the state of California that have antismoking or health-related warnings, but let's say those come down and, instead, the state of California gets plastered with billboards and signs sponsored by the tobacco industry saying, "There's nothing wrong with ETS."

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All right?

What would that do to risk perception in the state of California?

MR. MILES: Read it back to me, please.

(Record read.)

MR. MILES: The question --

MS. MYLES: Incomplete hypothetical, assumes facts not in evidence, lacks foundation, calls for speculation, vague and ambiguous.

THE WITNESS: My interpretation of the hypothetical is that people have already received hazard warnings regarding environmental tobacco smoke from numerous sources. As also part of your hypothetical, the tobacco industry is putting up ads saying, "ETS is not risky."

The net effect will be people will focus on the worst case information presented to them and they'll dismiss the tobacco industry information and believe that ETS is risky.

MR. BROOKEY: Q. So, again, based on information they're receiving from non-California-specific sources, you can say with a 95 percent confidence level that a massive campaign by the tobacco industry to convince people that ETS is not harmful would have no effect on risk perception; correct?

MS. MYLES: Objection; misstates his prior testimony, argumentative.

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MR. MILES: Assumes --
MS. MYLES: And assumes facts not in evidence and lacks foundation.
MR. MILES: Calls for speculation.
THE WITNESS: To add to that, you don't apply 95 percent confidence intervals to statements.
MR. BROOKEY: Q. Let's remove that part from the equation. You're saying --
MS. SHERIDAN: Same objection.
MR. BROOKEY: Q. -- that because they receive information from non-California-specific sources relating to the dangers of ETS, that if all such sources stopped being given to Californians -- I'm sorry -- if all California-specific warnings are removed and, instead, the tobacco industry undertakes a massive campaign to tell people that ETS is not harmful, there would be no change in risk perceptions?
MS. MYLES: Objection; incomplete hypothetical, lacks foundation, calls for speculation, vague and ambiguous, assumes facts not in evidence.
THE WITNESS: What I'm saying is that people will still gravitate towards the high-risk information presented to them as opposed to the statements by the tobacco industry.
If, on the other hand, the tobacco industry produced a National Academy of Sciences report saying that "We've reviewed all these studies and we believe that they indicate that there's no significant risk,"

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that would be a different source. That would not be the industry. That would also be drawing upon a government-sponsored agency, which could affect things differently.

MR. BROOKEY: Q. Well, so what has been the effect in the state of California -- and I notice you don't seem to have any data for 1998 and 1999 for the tobacco industry to have a press conference saying, "Aha, the judge in North Carolina has determined that the EPA's classification of secondhand smoke as a carcinogen is junk science and we are vindicated."

MR. MILES: It's argumentative as framed.

MR. KAPLAN: I don't think there was a question. Can you repeat that.

MR. BROOKEY: Yes, there was a question.

MR. KAPLAN: Then I missed it. Can I get that read back.

(Record read.)

MS. MYLES: Objection; calls for speculation, lacks foundation.

MR. KAPLAN: Incomplete hypothetical.

MS. MYLES: And assumes facts not in evidence.

THE WITNESS: I don't have data on how many people heard this information and how many people altered their risk beliefs, but I do have a study that I've written on how people process statements by

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industry and statements by government. And when the industry says the risk is low and the government says the risk is high, people believe the risk is high.

MR. BROOKEY: Q. What about when the government -- one branch of the government says the risk is high and another branch of the government says the risk is low?

MR. MILES: Incomplete hypothetical.

MR. BROOKEY: What do the data suggest in that situation?

MR. MILES: Incomplete hypothetical.

THE WITNESS: Well, I've done two government studies as opposed to different agencies, and if the government studies are in conflict, the people tend to average them.

MR. BROOKEY: Q. But you don't have any specific data regarding the impact of the North Carolina judge's ruling regarding EPA's findings on ETS on risk perceptions in California, do you?

A. I don't have California-specific data, but I have results from the study that enable me to at least make some comments on likely public response. And this is a study done for EPA on people's perception of cancer risks.

Q. When was that --

A. So --

Q. I'm sorry.

A. And so it is analogous.

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Q. When was that study done?
A. It's on my C.V. It's also listed as part of my declaration. 1997 it was published.
Q. Well, that was before the ruling in North Carolina; correct?
A. It's about cancer risks of air pollution as opposed to cancer risks from ETS.
Q. So the answer -- I mean, let's lay a little foundation. You know that the judge in North Carolina, in a decision that is now on appeal, took issue with the classification or the manner in which ETS was listed by EPA as a Class A carcinogen; correct?
A. I knew he threw out the study. I didn't know it was under appeal. So that's information you've given me.
Q. And you knew that the tobacco industry issued press releases regarding that decision; correct?
A. I didn't know what they did in the state of California.
Q. You know what they did nationally, though, don't you?
MS. MYLES: Objection; vague and ambiguous.
THE WITNESS: I know there was some press releases, but I did not review the press releases. I just looked at the press coverage.
MR. BROOKEY: Q. Okay. And do you have

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any reason to believe that Californians would put more stock in a legal decision by a district court judge than they would in a statement by the tobacco industry itself?

A. I don't know what, you know, is going through people's heads when they see what a judge did. Was this thrown out because of some legal technicality? The judge is not a scientist. So I'm not sure how people think about what judges do.

Q. All right. And there are no data to suggest or to determine how people respond --

MS. MYLES: Objection.

MR. BROOKEY: Q. -- or responded to that decision; correct?

A. Well, to the extent that you are talking about the tobacco industry touting a particular decision as implying low risk, people tend to dismiss that and focus on the governmental claims that declare a high risk.

Q. Now, you're familiar with the Butler case?

A. No.

Q. No? That was a secondhand smoke case. You're not familiar with that?

A. No.

Q. Okay. And the tobacco industry also -- are you -- actually, let me back up.

Are you familiar with a recent victory by the tobacco industry in a secondhand smoking case?

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A. I've read in the paper, but I don't know the name of the case.

Q. Okay. So the impact of press releases issued in connection with that victory in which the tobacco industry again said, "Well, see, we've been vindicated once more because someone else has tossed out a secondhand smoke claim," is not part of your expert analysis; correct?

MR. MILES: Assumes facts. It's argumentative as framed.

MS. MYLES: Objection; vague and ambiguous as to the term "not part of your analysis."

THE WITNESS: I don't know what a particular citizen of California draws in terms of the conclusion from a court case where a jury concludes that there's not a valid claim for compensation based on secondhand smoke exposures.

MR. BROOKEY: Q. Now, isn't part of risk perception the unanimity of the message received?

MR. MILES: I'm sorry. I just couldn't hear that. Could you read it back.

(Record read.)

MS. MYLES: Objection; vague and ambiguous.

THE WITNESS: I've never heard that. I'm not sure what you're talking about.

MR. BROOKEY: Q. Okay. For instance, let's say a Californian hears one time a day from any source that ETS causes cancer and hears a hundred

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times a day that ETS absolutely does not cause cancer.

Does the quantity of one side of the issue over the other impact risk perceptions among Californians?

MR. MILES: Incomplete hypothetical, calls for speculation.

THE WITNESS: You need to know the informational weights placed on the different information sources by the individual.

MR. BROOKEY: Q. And you didn't do that, did you?

A. I've estimated these for the government and the industry in my paper, but that does not pertain to environmental tobacco smoke in California, but I have done it for the context that I've studied.

Q. And do you know how much, if at all, the tobacco industry has stepped up its campaign in the state of California to convince people that ETS is not harmful in the last four years?

MR. MILES: Assumes facts.

MS. MYLES: Objection; assumes facts not in evidence.

THE WITNESS: I don't know that they have such a campaign.

MR. BROOKEY: Q. Okay. So -- and drawing conclusions regarding people's risk perception versus -- or as a result of the messages they receive, you didn't even think about any counterinformation

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imparted by the tobacco industry; is that correct?

MS. MYLES: Objection; misstates the testimony.

MS. SHERIDAN: And lacks foundation.

MS. MYLES: Misstates the witness's prior testimony which relates to belief.

MR. MILES: And it's argumentative.

THE WITNESS: My prior testimony pertained to whether I knew that the industry had launched a formal campaign, and I knew of no formal campaign.

As for comments by the industry regarding environmental tobacco smoke, the implications of my study would suggest that they would be dismissed by the general public.

MR. BROOKEY: Q. Even if those comments are framed in terms of "And a judge agrees with us"?

A. I've already discussed the judge issue.

Q. All right. Now, in terms of your concern that people tend to overestimate the risks of smoking, that concept is not original to you; correct?

A. I don't know.

Q. The tobacco industry came up with that line before it got evidence to support it over 35 years ago; correct?

MR. MILES: Counsel, that's argumentative.

MR. BROOKEY: Q. Is that correct?

A. I don't like the whole flavor of this. The original question, I thought, pertained to academic

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studies. So if you want to stick to academic studies, I don't know of any other academic study other than mine that was -- that did it before me.

Q. Are you aware of any nonacademic studies that investigated that issue?

MS. MYLES: Objection; vague and ambiguous.

THE WITNESS: No.

MR. BROOKEY: All right. I'd like to show you a document we'll ask the court reporter to mark as Exhibit 81. It's actually a group of documents that belongs together, cover letter with enclosures.

(Whereupon, Plaintiffs' Exhibit 81 was marked for identification.)

MR. BROOKEY: Q. Dr. Viscusi, have you ever seen a copy of this letter and enclosures before?

MR. MYLES: Hang on. Before you ask questions, I'd like to look at the document.

THE WITNESS: I want to read it.

MR. BROOKEY: Sure.

MS. MYLES: Can we take a short break?

MR. BROOKEY: Sure.

(Recess taken.)

(Ms. Myles not present.)

MR. BROOKEY: Q. Dr. Viscusi, have you had a chance to read the document we have marked as Exhibit 81?

A. Yes, I read it quickly, but I probably want

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to refer to it as you ask questions.

Q. Sure. Now, again, having read this, does that refresh your memory as to whether you've seen a copy of this letter and the enclosures before?

MR. MILES: Can you wait until I get off the phone, because I want to assert an objection. I'm trying to verify my entitlement to assert the objections. Could you wait, please?

MR. BROOKEY: I apologize. Counsel for the witness instructed me to proceed.

Ms. Sheridan, should I wait for Mr. Miles?

MR. MILES: All right. Are you -- first of all, counsel for Philip Morris is not present here. Her chair is quite conspicuously empty. We're both trying to determine whether or not there's a privilege objection that needs to be made through your use of this document.

Have you asked questions since I've been on the phone about this document?

MR. BROOKEY: First I need to respond to your first point, which is that the witness is represented here by Ms. Sheridan, who is the one who initiated the suggestion that we proceed with the deposition.

(Ms. Myles joins the proceedings.)

MR. BROOKEY: So any insinuation that you were making that I behaved improperly in acting upon the advice of this witness's attorney is unfounded and

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inappropriate.

I have asked him if he read the document, and he has not yet answered the question whether having done so refreshes his recollection as to whether he has ever seen it before.

MR. MILES: All right. I'm going to make an objection to your use of the document in this judicial proceeding. The document appears on its face to be privileged. It's written by an attorney, and there's reference in the context of it to the legal committee and to -- and it appears to be addressed to attorneys, to the extent that I can identify that with the brief phone call that I've been able to make.

I see there's reference to Henry Ramm. Okay? I do believe that he was general counsel for at least -- he was counsel for at least one of the companies in the past. And so I'm going to object to any use of this document as using material that is privileged, and I'm going to assert the attorney-client and work product privilege to the document.

I assume the other companies are going to want to do that as well so that my assertion of the privilege will apply to all of the companies that are here at the table.

MR. BROOKEY: I won't stipulate to that, because we've run into a problem like this before where Lorillard has voluntarily produced documents

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that other parties assert privileges to. I'm not suggesting Lorillard produced this document. I don't believe that it did. But I think anyone who wants to object needs to state his or her objection on the record separately.

MR. MILES: I've stated mine.

MS. MYLES: I was going to do so, in any event, on behalf of Philip Morris. We object to the use of this document as well in this proceeding. I, too, have made a call with an eye to determining getting more information about the document; but at present, lacking such information and given that the document appears on its face to be privileged, I must assert the objection at this time as well on both privilege and work product.

MS. SHERIDAN: And I would do the same on behalf of Brown & Williamson. Unlike what happened previously, this is, my understanding is, not something that's been produced by any of the parties here in the context of discovery.

And given that you've just given it to the witness at 5 o'clock California time, it has precluded any of us from checking with our clients, who are not based on the West Coast, to see whether or not this is a document they're even familiar with. So to preserve our objections, I'll make the objection on the grounds of both privilege for Brown & Williamson and American Tobacco Company as well.

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MR. KAPLAN: As long as we're all making objections on this ground, I have also placed a telephone call to my client. I'm waiting for a return call back to check on the status of the privilege of this document.

It's my understanding the document was -- based on the Bates stamp number and the information I have been told, that the document was produced by Liggett. As such, in addition to the attorney-client privilege and the work product privilege, we are asserting the joint defense privilege which Liggett does not have the capability, on behalf of either my company or the other companies, to waive.

And what I would request is that since I am waiting for a telephone call to confirm the status of exactly the privilege we are going to assert, which I expect to be coming in a little while, if this is the last topic that you have to cover, we can address it. If you have other topics, I'd ask that you wait until we can all confirm the information, because I was able to reach somebody back at my client's. So I should be able to get a definitive answer, I'm hoping, within the next 10 or 15 minutes.

MR. MILES: Can you tell us where the document came from? It has a trial exhibit number on it. Can you just indicate where you got this document from to help us?

MR. BROOKEY: I don't think I have to, but

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I'll be a good sport. This is a document that I obtained off of the Internet, not on any of the usual suspect websites.

MR. MILES: Which website did you obtain it from?

MR. BROOKEY: Frankly, I can't remember. I followed a series of links that may have begun with typing in "Viscusi." But I know that I followed a series of links to this document. So it's publicly available to everyone on the Internet.

It's been obviously introduced as a trial exhibit somewhere, and it appears to have voluntarily been produced by Liggett. So I think every claim of privilege, especially since they seem to be prophylactic claims, are unfounded.

MS. MYLES: I'm not sure that anything on the document indicates that it was voluntarily produced by anybody. There's no indication of voluntariness one way or the other.

And nor do we know from the trial exhibit whether it was -- whether it was introduced -- whether it was admitted into evidence at trial voluntarily; i.e., without -- not with an objection from the holder of the privilege.

MR. KAPLAN: Nor, I think, can we assume that merely because it was produced by Liggett there has been a waiver with respect to the joint defense privilege.

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MS. FOE: Let me just state, I don't know if this was produced by Liggett or not, and I'm unable to determine that at this hour. To the extent that it was not produced voluntarily by Liggett, then I'll object that it appears to be privileged by the attorney-client and work product privilege, but I can't determine that at this time.

MR. BROOKEY: Well, what I suggest we do, since nobody seems to have any foundation supporting a claim of privilege or work product and in light of the fact that Dr. Viscusi traveled out here from Boston and I would prefer not to have him be required to come out a second time, that to proceed -- we'll proceed and ask some questions, and you can take this up later, and the testimony will either be excluded or it will not be excluded.

MS. MYLES: Just a couple points. I don't think it's true that a foundation hasn't been laid for privilege. The document is privileged on its face.

MR. BROOKEY: Ms. Myles --

MS. MYLES: And the only question is: Was there a waiver by virtue of some other development that happened to the document subsequently?

I think that the document is facially privileged or at least it appears to be so. I think that Brad's suggestion -- Mr. Kaplan's suggestion made a lot of sense, just so the record's clear, that if you have other topics, if he can maybe get us at least

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some information in short order, why don't we move on and then see if we can come back to this.

Do you know whether this was one of the Bliley documents?

MR. BROOKEY: I don't know. I will -- I certainly don't want anyone thinking I pulled a fast one. This is not something I pulled from any collection of documents, Bliley or otherwise. This is something that is on a website dealing with completely different issues. So if there's an overlap between this and Bliley, I honestly and frankly don't know.

MS. MYLES: Okay. It would help a lot if you were able to tell us where it came from, what website it came from.

MR. BROOKEY: I don't recall.

MS. MYLES: But would you be able to find out?

MR. BROOKEY: I doubt it.

MS. MYLES: Okay. Why don't we move on, then, to other topics.

MR. BROOKEY: I actually don't have very many more questions to ask Dr. Viscusi other than relating to this document.

Q. I do want to ask you a few questions again about your general area of expertise. And in terms of your expert work in the past, you have dealt with economic issues arising from smoking restrictions; correct? I'm not being inclusive. That's one of the

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things that you have focused on in prior work; correct?

A. Prior work or prior testimony?

Q. Prior expert testimony.

A. Environmental tobacco smoke, to the best of my knowledge, only came up with respect to the OSHA public hearings.

Q. Okay. So in terms of what you've done as an expert witness on ETS-related issues, that would be limited to the OSHA hearing in, I think, 1994?

A. That's the only one I can recall where ETS came up.

Q. Okay. And you consider yourself an expert in warnings related to ETS?

A. I consider myself an expert on warnings principles generally.

Q. And again, it's your position that in evaluating the effectiveness of a warning in conveying the risk associated with a product, the possibility of competing messages that are contrary to that warning impacting the risk perception is not relevant; correct?

MR. KAPLAN: Overbroad, misstates prior testimony.

MS. MYLES: Can you read back the question, please.

(Record read.)

MS. MYLES: Vague and ambiguous also.

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MR. MILES: It's also an incomplete hypothetical, calls for speculation.

THE WITNESS: My understanding is that my testimony contradicts what you just said.

MR. BROOKEY: Q. Okay. I'm sorry. In what way did it contradict what I just said?

A. For example, I indicated if you have the government providing a warning, a high warning and another warning, that people would average the information.

Q. Okay. I'm sorry. That's with respect to different warnings given by the government.

A. Right.

Q. Whereas government, for instance, versus industry, people would accept the most extreme warning or the warning conveying the highest amount of risk?

A. They'll place the greatest weight on the high-risk information, whether it's from industry or government.

Q. And there are data supporting that?

A. Yes.

Q. And those data are reflected in your 1997 paper that you talked about earlier?

A. Yes.

Q. Are they reflected anywhere else?

A. I have other papers dealing with multiple sources of information, but not from different sources.

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Q. Have you reviewed any California textbooks?
A. I've reviewed sections from two California textbooks, the chapters on tobacco.
Q. When did you do that?
A. As part of my work either in August or early September.
Q. There's a difference, isn't there, between causation and association?
A. Correlation and causation are not the same thing. So association would be like correlation.
Q. So just because things are close in time doesn't mean that one caused the other; correct?
MR. KAPLAN: Vague.
THE WITNESS: Well, let's say it's raining today and Mark McGwire didn't hit a home run. Rain in San Francisco didn't necessarily cause him not to hit a home run.
MR. BROOKEY: Q. And even two things that occurred --
Why don't we take a break because I need to check with someone as well.
(Recess taken.)
(Mr. Kaplan not present.)
MR. BROOKEY: Let's go back on the record, because all my courtesies in allowing counsel to take breaks to discuss matters and waiting for everyone to return have been turned against me, and I'm told I'll have to pay for every extra minute.

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MS. SHERIDAN: No one's turning against you, Brian. I told you what the witness's payment policy was.

MR. BROOKEY: Right. But I would have been a lot less willing to, for instance, wait for people to return from breaks and lunch and things if I'd known that the meter had still been running. That was not my understanding.

Q. All right. Dr. Viscusi, so two things that happen, regardless of whether they happen close in time, but relate to the same subject matter do not necessarily exhibit a cause-and-effect relationship; correct?

A. Not in all cases, that's correct.

Q. So you're not aware of any data that conclude that, for instance, the fact that some warning signs may have been sent out in 1989 referring to tobacco smoke caused anyone in the state of California to have an increased awareness of the risks posed by tobacco smoke; correct?

MR. MILES: Could you read that back, please.

(Record read.)

(Mr. Kaplan joins the proceedings.)

THE WITNESS: I've dealt with this issue earlier, which is that there were multiple events going on. The net effect was that there's substantial awareness of this stated relationship.

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MR. BROOKEY: Q. But --
A. But --
Q. I'm sorry.
A. -- as I indicated earlier, you can't disentangle statistically the role of simultaneously occurring events.
Q. So you can't look at any type of message that has been conveyed since 1989 to citizens or residents of the state of California and say that any specific message or warning campaign caused an increase in awareness; correct?
A. That's the nature of the statistical problem, which is with simultaneously occurring events that could potentially influence the outcome, you can't break out which one did it, because you don't have a pure experiment. We haven't figured out which people got which and only particular kinds of information.
Q. And if you look at the whole and look at everything that has been done, you can't say that all of the efforts taken in the state of California specifically to convey messages regarding the dangers of secondhand smoke caused an increase in public awareness of that issue; correct?
MR. MILES: Could you read it back, please.
MR. BROOKEY: No. Let's not, because I'm being charged, Counsel.
MR. MILES: Counsel, I'm entitled to have

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your questions -- you have a fan that blows here. I've asked you to do something about the fan. It's still blowing. I can't hear your question. You're sitting across a large table. And I'd like to hear the question to see if there's objections that I need to make to it.

Ms. Court Reporter, could I ask you to read the question back for me, please.

(Record read.)

MR. MILES: The question's vague, contrary to his prior testimony.

THE WITNESS: The question also ignores the comparisons between the state of California and other states. And the reason why the CDC has cited the state of California is that relative to other states, there has been evidence of greater efficacy of the antismoking effort. So the statistical test there would be the cross-state comparisons that have not had the California policies.

MR. BROOKEY: Q. So you're saying there is a direct causal link?

MS. MYLES: Objection; misstates his testimony.

THE WITNESS: I'm saying that to the extent that you compare California across other states where the main thing you're turning off is the California-specific information, that in view of the CDC, there is an effect.

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MR. BROOKEY: Q. All right. Now, how strong is that causal effect compared to the causal effect between ETS exposure and cancer in nonsmokers?

MS. MYLES: Objection; vague and ambiguous.

MR. MILES: Lack of foundation.

THE WITNESS: And it means nothing. This is just a meaningless comparison.

MR. BROOKEY: Q. Well, smoke causes cancer, doesn't it?

MR. MILES: Counsel, it's asked and answered, lack of foundation, outside the area of this man's expertise. Now you're becoming argumentative in your tone.

MS. SHERIDAN: We've gone through the whole thing.

MS. MYLES: It's also vague and ambiguous as to products.

MR. BROOKEY: I think we've just established the term "cause."

Q. Smoking causes cancer, doesn't it, Dr. Viscusi?

MS. MYLES: Same objections.

MR. BROOKEY: Q. Under your definition of cause that we just went through.

A. I indicated earlier that in terms of smoking causes cancer, that there is the possibility of an increased risk of cancer, but it was not a 1.0 probability.

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Q. Is there a 1.0 probability that the California-specific messages that have been conveyed regarding the dangers of secondhand smoke are exclusively responsible for the increase in public awareness of those dangers?

A. If that's the only across-state difference, which was my hypothetical, and there is an across-state difference in the outcomes, then we would attribute that to the difference in the experimental manipulation, which by assumption the only thing is the ETS information.

Q. So the answer is yes?

MS. MYLES: Objection; misstates his testimony.

MR. BROOKEY: Q. Or is the answer you need more information than what's in your declaration?

A. I'm not sure what your question is. You know, when you say "The answer is yes," my answer was my answer --

Q. All right.

A. -- whatever it was.

I mean, it was a complicated answer because I have to try and define things from your question as part of the answer.

Q. Has anyone in the tobacco industry ever told you that if you obtained results relating to risk perception that were contrary to industry's position, you should turn them over to the industry for

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destruction?

A. No.

Q. And were you aware before you read Exhibit 81 that that has at least at one point in time been a suggestion that was made by the industry with respect to adverse information?

MS. MYLES: Objection; assumes facts not in evidence, mischaracterizes the document, also incorporates into the document -- into the question a document as to which privilege and work product has been claimed.

MS. SHERIDAN: Additionally, you have not asked this witness as a preliminary foundation matter whether he's even seen this document before you gave it to him today.

MR. MILES: I'll join in all the objections.

MR. KAPLAN: And what I'd like to do is take a break now, confer with defense counsel, since I have now received information on the privilege regarding the document, and then we'll come back and do a statement on the record.

MR. BROOKEY: Is there a privilege or isn't there?

MR. KAPLAN: There is.

MS. MYLES: We need to talk about it before --

MR. KAPLAN: And I'm going to address --

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MR. BROOKEY: Let me ask a couple more questions before we go to this.

MR. MILES: Don't ask anything about this document until we have a chance to confer about whether it's privileged or not.

MS. MYLES: I'd also like to have the question -- well, we'll need to discuss how to deal with the question that incorporates the contents of the document.

MR. BROOKEY: Q. Dr. Viscusi, has the tobacco industry ever asked you to do anything that you felt would be unethical?

A. No. In fact, the condition for my work on the data is that I'd be free to use it for my research, however it turned out.

Q. Has the tobacco industry ever given you a foregone conclusion and asked you to perform research that would support that?

A. No.

Q. Okay. Would that be an acceptable scientific process to undertake?

MS. MYLES: Objection; vague and ambiguous.

MR. MILES: Assumes facts.

THE WITNESS: I don't know what you even mean by "a foregone conclusion." If they're asking me to prove that the sun's going to come up tomorrow, which is something everybody knows that that's a foregone conclusion, so I don't see where that would

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be wrong. But I've never been engaged in any research project where they've told me what my answer should be from that project.

MR. BROOKEY: Q. Now, you attacked Dr. Johnson's statement regarding an effective warning and, in particular, that 95 percent of the people should see it at least once over a three-week period; correct?

A. No, I critiqued his statement that we need to do that. That's not a statement about what an effective warning is. That was his statement of what additional mechanisms or efforts should have to be undertaken for the tobacco industry to fulfill its obligations.

Q. Would that be a bad way to convey information that would be new to Californians?

MS. MYLES: Objection; vague and ambiguous, assumes facts not in evidence, calls for speculation.

MS. SHERIDAN: It's also compound.

MR. MILES: Join.

THE WITNESS: Just starting off with the word "new," Dr. Johnson never established that there was any new information to convey with his repetitive messages.

MR. BROOKEY: Q. Well, let's assume there is, because I think we're established from your declaration there's no evidence that, for instance, Californians know that the State of California knows

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that chemicals within ETS cause birth defects. So let's assume that that is new information.

Would following Dr. Johnson's recommendation be, in noneconomic terms, a bad idea, a bad way to do it?

MR. MILES: It's argumentative, assumes facts, vague.

MS. MYLES: It also misstates the contents of the witness's declaration and the witness's prior testimony, and the form of the question is improper.

THE WITNESS: And I've also never stated that there's no evidence that people don't understand the risks of birth defects, which is what you claim my testimony purports to say.

MR. BROOKEY: Q. Well, I think the record will be clear, but again, assuming that we wanted to convey to residents of the state of California new information in a convincing manner regarding the dangers of environmental tobacco smoke, would employing the mechanism suggested by Dr. Johnson with respect to 95 percent three times be a bad way to do it?

MR. MILES: Hang on.

MS. MYLES: Vague and ambiguous as to the word "bad," incomplete hypothetical, lacks foundation.

MR. MILES: And misstates the standards for compliance with Proposition 65.

THE WITNESS: The question also misstates

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my responsibilities as an expert. Your expert never documented in a scientific manner the validity of his own proposal. Given that there's no documentation there, it's not my task to provide scientific evidence to support that. He just pulled this out of the air. And without scientific support, there's no need for me to go any further.

MR. BROOKEY: Q. And you pulled out of the air, as someone who is not an expert in the requirements of Prop 65, that there is no need for the cigarette industry to augment current efforts with an additional public education campaign; correct?

MR. MILES: That's argumentative.

MS. MYLES: Misstates his testimony, misstates the document, the declaration.

THE WITNESS: My intent is --

MR. MILES: Hang on a second.

Could you read the question back, please.

(Record read.)

MS. SHERIDAN: Further objection to the extent you're implying that Dr. Johnson has any expertise in Prop 65. She doesn't.

THE WITNESS: My intent in my declaration was never to provide legal ruling on anything with respect to Proposition 65, only to make comments with respect to assessments with respect to hazard communication systems and effective warnings.

MR. BROOKEY: Q. All right. Have you ever

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offered any expert opinion that a warning of a hazardous risk should be provided by a manufacturer of a product?

A. Yes.

Q. When?

A. I don't know the dates, but some of the cases involved risks from pesticides, the importance of protective equipment when playing softball, electrical hazards and other risks.

Q. Have you ever advocated that the cigarette industry or the tobacco industry should be given any additional warnings with regard to the risks posed by its products?

A. In my book I advocate that the government establish a national rating system for the comparative riskiness of cigarettes and that the cigarettes be permitted to provide that information, which they are not now allowed to do because that would be interpreted as a health-related claim on behalf of their product.

Q. And by "comparative risk," you mean if you smoke a Marlboro, you won't die as quickly as if you smoked a Camel?

MR. MILES: Argumentative.

MS. MYLES: Objection; assumes facts not in evidence.

THE WITNESS: I would want the government to develop a meaningful risk rating scheme which

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presumably would capture the health consequences of smoking.

MR. BROOKEY: Q. Do you think that cigarette companies are doing enough to warn people about the dangers of secondhand smoke?

MR. KAPLAN: Vague, overbroad.

MS. MYLES: Vague and ambiguous.

THE WITNESS: I think they've certainly undertaken a tremendous effort in the state of California, and you would have to judge enough by where the public's risk perceptions is and how do they compare with the scientific assessments of the risk. I have no evidence that the public underestimates the risk. In fact, the evidence I have from other contexts suggests that there's dramatic overperception of the risks of environmental tobacco smoke.

MR. BROOKEY: Q. So that is a yes, they are doing enough to warn people?

A. Yes. I know that there's no -- I know of no failure in their efforts.

Q. Do you think they're being forced to do too much to warn people?

MS. MYLES: Objection; vague and ambiguous.

MR. MILES: It's vague.

THE WITNESS: Too much from what standpoint?

MR. BROOKEY: Q. From an economic

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standpoint.

A. Do I think we need additional warnings that they should be compelled to provide? No. The public already understands the purported linkage.

Q. What I'm saying, Dr. Viscusi, is: Do you think that the tobacco industry is already being forced to do too much from an economic standpoint to warn people of the dangers posed by ETS?

MR. MILES: It's vague, also assumes facts.

THE WITNESS: Where? I don't know what we're talking about in terms of what they're being forced to do. Is it just California we're talking about?

MR. BROOKEY: Sure, let's limit it to California.

MR. MILES: Same objections.

MS. MYLES: And does your question include MSA warnings given in California pursuant to FCLAA?

MR. BROOKEY: I'm talking about everything the cigarette industry claims they're doing in the state of California to provide warnings of the dangers of ETS.

Q. Now, as an expert on warnings and particularly an expert on the economic impact of warnings, do you think that what the tobacco industry says it's doing is more than is necessary?

MS. MYLES: You've now changed the question from what they're being forced to do to what they've

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actually done?

MR. BROOKEY: Yes. I'm sorry. What did you say? I may have misheard you.

MS. MYLES: Your original question asked about what they were being forced to do. Now you're saying what they've done?

MR. BROOKEY: Well, do you want to tell me that anyone in the tobacco industry has voluntarily warned people that ETS causes cancer and birth defects other than Liggett?

MS. MYLES: I do believe that that's what the evidence shows.

MR. MILES: Yeah.

MS. MYLES: I'm not quite sure that -- I'm just trying to clarify your question.

MR. BROOKEY: Wow, I never heard that position stated, that you voluntarily warn people that ETS causes cancer.

MR. MILES: Counsel, why don't you just ask a question rather than argue. The answer to your question is "yes." We'd rather not sit here and argue at your expense, which you're complaining about, since you have to pay the witness for this time. Why don't you frame a question.

MR. BROOKEY: Dr. Viscusi --

Fine. Since I'm now hearing for the first time after a year that the tobacco industry is saying that they have voluntarily warned people that they're

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killing them through ETS, I'll remove the forced and make it broader.

MR. MILES: I'm going to move to strike your comment. It's argumentative and not true.

MR. BROOKEY: Q. Is it your position, Dr. Viscusi, that all of the efforts that the tobacco industry says it has engaged in within the state of California to convey the adverse health effects of ETS are more than what is actually required from an economic standpoint?

MR. MILES: Assumes facts the way the question is worded.

MR. KAPLAN: Vague as to what is required from an economic standpoint.

MR. MILES: Join.

THE WITNESS: I don't know about the legal issues, but in terms of communicating the risks as they've been documented in the scientific literature, I think these efforts have certainly gone beyond the call of duty in terms of the extent of the warnings, which I regard as one of the most massive public information campaigns I've ever seen.

MR. BROOKEY: Q. So relative to the risk actually posed by ETS, your position would be that the tobacco industry has overwarned?

MR. MILES: Assumes facts.

THE WITNESS: I didn't say overwarned. I've said they've undertaken this massive campaign.

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That's different than saying, let's say, distributing 160,000 signs instead of 60,000 signs is overwarning.

MR. BROOKEY: Q. Would you like to see Prop 65 repealed?

MS. MYLES: Objection; not reasonably calculated to lead to the discovery of admissible evidence.

THE WITNESS: I actually haven't given it much thought. So I'd want to evaluate what effect it had. It's not just about cigarette warnings. It's about safe drinking water was allegedly in the title of it. So I'd want to see all the different aspects of the law and what effects they had.

MR. BROOKEY: Q. Would you like to see FCLAA repealed?

MR. KAPLAN: Same objection.

THE WITNESS: This is a warning system that's out there. I think the federal government is a proper venue for thinking about risks posed by nationally marketed consumer products. And if this is the judgment that Congress made, I'm happy to go along with it.

MR. BROOKEY: Q. Have you ever undertaken any efforts to lobby Congress with respect to a possible repeal of FCLAA?

A. No.

Q. What about with a possible amendment of FCLAA?

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A. No.
Q. Have you been asked to undertake any such efforts?
A. No.
Q. Would you do so if you were asked?
MR. MILES: Calls for speculation.
MS. MYLES: Incomplete hypothetical.
THE WITNESS: It all depends on what they're asking me to do.
MR. BROOKEY: Q. Now, if I tell you -- or I'm sorry. Again, let's assume that California has no significant risk levels for carcinogens that are well established and scientifically valid. All right? And let's assume that by the cigarette industry's own admission, at least one of the chemicals in ETS exceeds the no significant risk level, and they're required, therefore, under law to provide a warning. Do you think their current efforts comply?
MR. MILES: Could you read it back, please.
(Record read.)
MS. MYLES: Objection; calls for a legal conclusion, incorporates into the question facts and legal conclusions that are not in evidence, calls for speculation, lacks foundation, vague and ambiguous.
MR. MILES: Join.
THE WITNESS: I also thought the no significant risk business was confusing, because I thought you said originally that there was no evidence

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of significant risk, but apparently you mean that there is evidence that the risk is nonzero.

MR. BROOKEY: Q. No. In other words, there's a no significant risk level, an NSRL. I was trying not to use the acronym because you said earlier you were not familiar with it.

So let's assume we have a scientifically valid and defensible number.

A. For a significant risk?

Q. For a significant risk, right.

A limit of their threshold after which a warning is required under Prop 65. And let's say the --

A. So that means the risk is now significant by assumption?

Q. Right. And the tobacco industry admits that with respect to one of the constituent chemicals or more than one of the constituent chemicals of ETS, they have exceeded that no significant risk level.

And let's assume that Prop 65 requires that in those instances, the tobacco industry would have to provide a warning to nonsmokers that said -- or that informed those smokers that ETS contained a chemical that was known to the State of California to cause cancer.

Do you think, given their -- what they claim to be their current efforts to give warnings, they're in compliance with the law?

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MS. MYLES: Same objections as before.
MR. MILES: Join.
MS. SHERIDAN: Compound, complex.
THE WITNESS: It is asking for a legal judgment as well. And I don't think you can assess, even from a warning standpoint, ignoring legal judgments, how effective a warning system is relative to what you should be doing unless you say something about how big the risk is.

So if one whiff of environmental tobacco smoke gives everybody cancer, it's a lot different situation than if there's a very low probability, since you'd want a different warning system in those two different instances.

MR. BROOKEY: Q. Do you own stock in any tobacco company?

A. I own shares of Vanguard Mutual Fund. I don't know what they do with my money. And I have Harvard pension money. But apart from what mutual funds may buy, I don't personally own stock. So no individual shares of companies.

Q. Does anyone in your immediate family own stock in any tobacco company?

A. Not that I know of.

Q. Is the amount of money you were paid in connection with this litigation contingent in any way on the content of the testimony you give?

MS. SHERIDAN: Lack of foundation. He's

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already testified he hasn't been paid any money in connection with this litigation.

THE WITNESS: I'm paid for my time regardless of what I say or whether we win or lose.

MS. SHERIDAN: Speaking of which, Mr. Brookey, you are well into that additional hour, and I just want you to confirm that you'll have an additional check prepared for this witness. If you're going to continue to ask questions, I think you should tell us if you want to do this.

MR. BROOKEY: Let's take a break.

(Recess taken.)

MR. MILES: Are we on the record?

MR. BROOKEY: Yes, we are now.

MR. MILES: We've obtained additional information from various of the companies about this document. It appears that it is privileged, as it would appear on the face. And we understand that the privilege has been asserted for the document in the past by the companies, and there's no indication of any waiver by my client here or the others. We don't know about Liggett.

And so we're objecting to your using the document in the deposition. There's been no foundation that this witness has ever seen the document before which would entitle you to argue that he's entitled to be questioned about it or that there's been any waiver by allowing him to use it or

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see it.

So we're asserting an objection to your using this or incorporating the text of it into any of your questions.

MS. FOE: And I'll join the objection to the extent that the privilege has not been previously waived by Liggett.

MS. MYLES: And I join the objection on behalf of Philip Morris.

MS. SHERIDAN: I join the objection on behalf of Brown & Williamson.

MS. MYLES: Just to be entirely clear, our objection is based on privilege and work product and joint defense.

MR. MILES: Exactly.

MR. KAPLAN: I'll join also.

A couple of questions. Has this document been marked as an exhibit?

MR. BROOKEY: Yes, it has.

MR. KAPLAN: Okay. We need to do one of two things, then, either unmark it as an exhibit or we would request that the transcript be sealed until we can either adjudicate the issue, because otherwise you've got a document inappropriately about which there's a privilege being asserted, you're unable to indicate what the exact source of the document was. I have been informed that my client has in the past asserted the privilege over this document.

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MS. MYLES: I'm informed of that as well with respect to Philip Morris.

MR. BROOKEY: Okay. I, unfortunately, am going to have to disagree with Mr. Kaplan. I am offended at the remark that I got the document inappropriately. I think I made it clear that I got the document completely appropriately. I volunteered what was probably work product information, without an intent to waive, you know, on other grounds, to demonstrate my good faith in obtaining this from the Internet. So I just need to make the record clear.

Now what I haven't heard yet is an instruction not to answer from Ms. Sheridan to her client --

MS. SHERIDAN: Well --

MR. BROOKEY: -- or her expert.

MS. SHERIDAN: Do you have a question even pending?

MR. MILES: Was there a pending question?

MR. BROOKEY: So the question I have is: Do I need to ask each question that I would like to ask regarding this document and get instructions not to answer on each of them and move to compel answers to specific questions, or can we preserve the record or preserve this issue by just stipulating that you will not allow him to answer any questions regarding the contents of this document?

MR. MILES: I think you have to ask your

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questions. We can assess each one individually. There may be questions that you're entitled to ask, you know, for example, which potentially would show that he's seen the document and formed a basis for his opinion. And if that's the case, then we may have to reassess our privilege position.

MR. BROOKEY: Right.

MR. MILES: On the other hand, without that, the privilege would apply and we're asserting it.

MR. BROOKEY: I understand. That was a distinction I was trying to make between asking questions about the content versus asking foundation questions, for instance --

MR. MILES: You can't. We're just going to have to take them question by question.

MR. BROOKEY: Q. Okay. Mr. Viscusi, if you look at this letter, you'll see the line addressed to a number of people, Messrs. Ramm, et cetera. Do you see that?

A. Yes.

MR. MILES: Hang on a second. Can we have an agreement, which may save some time here which you're paying for, obviously, and complaining about, that we don't have to state our objection to your use of the document before every question?

MR. BROOKEY: Well, I think we need to clarify, because I think I clearly am entitled to ask

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foundational questions as to whether he knows who any of these individuals are.

MR. MILES: Okay. But here's what I'm concerned about. You can ask him whether he recognizes names without incorporating your question -- the document into your question.

MR. BROOKEY: All right.

MR. MILES: If you do that, I think we might facilitate the process. I'm objecting to your incorporating any reference to this document into any of your questions. And if you are going to make me make that objection prior to each question, I will, but it will take some time. There's a way to avoid my having to object here.

MR. BROOKEY: Yeah. I think it might be elevating form over substance, but I'll give it a try.

MS. MYLES: I would also like -- go ahead. I thought you were --

MR. BROOKEY: Do you have more to add?

MS. MYLES: I have one thing to add. I would like an agreement, if we can reach one, that there will be no contention by plaintiffs that showing -- that because this document has been shown to this witness in this deposition, there's been some sort of waiver. We object -- to the extent that would be an argument, we object to it.

I would like to be able to agree to that, because I think that's how we should proceed. If

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we're going to allow the document to be shown to the witness, allow him to look at it and answer any questions about it, we need to have that as an agreement.

MR. BROOKEY: Yeah. I certainly had no intention of making that kind of argument. I think your objections are all extraordinarily well preserved for the record.

So let me start with some foundational questions regarding the allegedly privileged nature of the letter, and then we can see if we can get on the record some specific questions that can be the subject of a motion to compel later.

MS. MYLES: Okay. So his being -- you will not argue that his being shown the document is itself a waiver?

MR. BROOKEY: That's correct, his being shown the document today by me.

MS. MYLES: Correct.

MR. BROOKEY: At this deposition.

MS. SHERIDAN: Just as one more foundational issue, I don't think that when we first got started with this you ever established that the witness had ever even seen this document, because if he hasn't seen it, I don't know how appropriate any line of questioning you would have on this document would be for this witness.

MR. BROOKEY: Well, let's see.

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Q. Have you ever heard of the name Mr. Ramm before, R-a-m-m?
A. No.
Q. What about Mr. Metsko or Hetsko?
A. Never heard of that name.
Q. Or Mr. Haas?
A. Never heard that name.
Q. Or Mr. Russell?
A. I work for somebody named Russell, but I don't think it's the same Russell. So I've known people named Russell before.
Q. Okay.
A. But not lawyers likely to have been recipients of this.
Q. When I ask you these questions, let me limit them to anyone that you are aware of in the tobacco industry or involved with law firms representing the tobacco industry.
This is particularly true because the next question I want to ask about is a Mr. Smith.
A. No, never heard of that.
MR. KAPLAN: And, Dr. Viscusi, to avoid us having to interpose a large number of objections during this line of questioning, because I note that you put your glasses on and just took them off when you looked at me, the questions that Mr. Brookey is asking you are independent of your reviewing any documents.

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So he's going to be giving you a list of names. Disregard what the source may be for his obtaining that list of names. Do you understand?

THE WITNESS: Yes.

MR. BROOKEY: Q. And the same question with regard to Mr. Yesmin, Y-e-s-m-i-n.

A. I've never heard of that person before.

Q. Or Mr. Austern?

A. The same answer. I've never heard of that person.

Q. Or Mr. Wald?

A. I don't know Mr. Wald either.

Q. Or Mr. Weld, other than Bill Weld?

A. I don't know Mr. Weld.

Q. All right. What about Mr. Krash, K-r-a-s-h, first name Abe?

A. I've never heard of Mr. Krash.

Q. Are you familiar with a document called the Royal College report?

A. On what? Usually Royal College reports are on certain things.

Q. All right. On the risk to health posed by tobacco smoke.

A. I don't know.

Q. Are you familiar with a Royal College report with regard to the risk to health posed by smoking?

A. I don't know if this is the same as the

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British doctors' study or not. So I've never -- I don't recall seeing anything called Royal College report, but I may have seen it under a different name or as a journal article.

Q. What is the British doctors' study?

A. Well, there's study -- there's a study of the risks from cigarettes to British doctors.

Q. When was that study conducted?

A. I don't know the exact dates.

Q. Had it been conducted by 1964?

A. No. It's more recent than that.

Q. Do you have any knowledge of the tobacco industry's knowledge of the risks of cigarette smoking as of 1964?

MS. MYLES: Objection; vague and ambiguous, overbroad.

MR. MILES: Join.

THE WITNESS: I don't know what the tobacco industry was thinking then, so I wouldn't -- so I would have no way to know what was going on inside their heads.

MR. BROOKEY: Q. Are you familiar with the name Gary Steiner?

A. No.

Q. David Berle?

A. No.

Q. Are you aware that the tobacco industry took the position in 1964, prior to commissioning any

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survey on that point, that Americans tended to overestimate the risk to their health posed by smoking?

MR. KAPLAN: Assumes facts.

MS. MYLES: Objection; assumes facts not in evidence.

MS. SHERIDAN: Vague as to what you mean by "on that point."

MS. MYLES: Also, to the extent it relies on information in this document, we would object to the question on the grounds of privilege and work product.

MR. MILES: Join.

THE WITNESS: I'm not aware of any such public statement or position.

MR. BROOKEY: Q. Are you aware of the tobacco industry taking an internal position in that regard?

MS. MYLES: Same objection. And further objection to the question on the grounds of privilege and work product to the extent it's derived from anything in Exhibit 81.

MR. MILES: Join.

MS. SHERIDAN: And, Don, just so it's clear, at the beginning of the deposition we said that any objections would apply to all of us. I just want to make that clear, so it's not unclear on the record, that your joining doesn't mean that Lorillard and B&W

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would be left out of objections.

THE WITNESS: I'm going to exclude any awareness that I might have -- from any judgment regarding awareness any information in this exhibit, since I really don't know who it's from, who it's to or what this means.

But in terms of my own knowledge, I'm not aware of any efforts such as the ones you've described or beliefs.

MR. BROOKEY: Q. Okay. So before you reviewed the document marked as Exhibit 81, you had no awareness that the tobacco industry had taken the position that Americans tended to overestimate the risk posed by smoking as early as 1964; correct?

MS. MYLES: Objection; misstates the -- first of all, objection to the extent that the question relies on information contained in Exhibit 81 on the ground that the information -- the document is privileged, work product and joint defense.

Further, the question misstates the contents of the document as well.

MR. MILES: And assumes facts.

MS. MYLES: And is also vague and ambiguous as to the term, I believe it was, "the industry," or words to that effect, taking a certain position.

MR. KAPLAN: And, Brian, just so that I'm clear, you had indicated, I thought -- and correct me if I'm wrong -- that the privilege objections are not

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automatically joined in by all counsel, or do you want to allow us to do that?

MR. BROOKEY: No, I do want to allow you to do that. My comment earlier was with regard to the objection as to the introduction in evidence or questioning in general of the document itself, and I wanted to make sure that each of you independently was asserting a privilege. But as individual objections, come one, come all.

MS. MYLES: We may want to continue the stipulation, at least with regard to Philip Morris, RJR, Brown & Williamson and Lorillard. I don't know what Liggett wishes to do in that regard.

Do you want to join all our objections automatically, or do you want to object independently?

MR. BROOKEY: Gee, you guys never ask Liggett to join in anything these days.

MS. FOE: I would be happy to join you.

MR. BROOKEY: All right. I think there was a question pending. Can we read it back.

THE WITNESS: I think it was just a repeat of the question, but let's hear it again.

(Record read.)

THE WITNESS: I still have no awareness that they took such positions before 1964. So that's your claim that they did that. When you say I have no awareness, you're saying I have no awareness of some fact, and I'm not aware that this is a fact that I'm

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supposed to be aware of.

MR. BROOKEY: Q. Well, the document marked as Exhibit 81 specifically indicates as the industry position that the risk of health is overestimated; correct?

MR. MILES: Hang on a second.

You're clearly disclosing the content of the document at this point and asking him to incorporate that into his testimony one way or the other. That's clearly invading the privilege that we're asserting here.

MS. MYLES: We're just going to instruct him not to answer.

MR. MILES: I think you know what his awareness is and what his testimony is. Now you're just trying to put the document into the record, which is inappropriate.

MR. BROOKEY: I think I must have misunderstood our earlier conversation.

First of all, I'm not sure if an expert witness can be instructed not to answer in the same way that a client or witness represented by counsel can be; but assuming that's the case, I thought we indicated earlier that I needed to ask every question I wanted to about this document to preserve my right to bring a motion to compel answers to specific questions.

MR. MILES: Well, my proposal for you was

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that you do your best to ask about the subject matter, which you've been doing up until now, without disclosing the content of the document. So that to the extent it was not necessary for you to disclose it, you could see that and we could all see that.

What you're doing now is that he's told you that he doesn't have any knowledge about the industry position or contentions at that time as it relates to whether the public had been overwarned or was overly aware of risks in 1964 or before. I don't think -- I think his testimony is pretty clear that he doesn't have knowledge on that.

What you've done now is you've gone back to reaffirm that he doesn't have that knowledge, but you've taken and put into your question the content of the document, which I think really does require us to instruct him not to answer or to stop the deposition to seek a protective order.

And what I would propose that you do is ask any other questions that relate to the general subject matter that you think is raised by this document and explore that without incorporating the text of the document, which is -- to the extent you can, and then at that point move to the document if you feel compelled to do that, at which point we will assess whether we have to instruct him or whether we have to stop the deposition to seek a protective order to keep you from doing what we think is inappropriate.

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MR. BROOKEY: Well, I --

MR. MILES: So I think you're entitled to ask him whether he has any knowledge as to what position the industry took in 1964. You've done that without referring to the document, and that's fine. But to the extent you're now taking the substance of the document and putting it into your question, it's not fine as we see it.

MR. BROOKEY: Okay. What I'm talking about -- and I don't -- I don't want to be unduly formalistic, but ordinarily in a motion to compel answers to deposition questions, you put the exact answers and the questions and instructions before the court, and the court rules on those questions and instructions and not on a broad category, which is why I think really to preserve my right to bring a motion to compel answers to questions concerning the documents I need to get the questions out.

MR. MILES: I understand that.

MR. BROOKEY: I'm happy if you want to have me go through, and I don't have that much more probably to ask that don't get into the content, and just so we can all agree, which may be in your all interest, to not have this out in a record at all that I don't need to ask specific questions but a motion to compel, we can maybe pick one as an exemplar, can be brought that, if granted, would allow me the right to inquire further into the contents of the document.

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MR. MILES: Well, I would propose that you ask all of the questions that you have that do not require incorporation into the question of any of the text of this document. And then at that point, if you want to make a record of your need to rely on this document, you do what you feel you have to do. And we will then decide either to instruct him on the individual questions or to stop the deposition, seek a protective order.

But let's get everything else done so that the only thing left to be done is to fight over this document and your use of it. I predict that if you -- if there isn't any subject matter that you can ask him about that he can answer you without any reference to this document, if you try to do that, because he hasn't seen the document so far as we can tell, he doesn't know any of the people in it, he doesn't know what they're talking about, and so all you're -- it seems to me you can explore the subject matter without having to invade the privilege that applies and is raised by this document.

MR. BROOKEY: Q. Dr. Viscusi --

MR. MILES: I predict that Judge Prager will see it the same way as I do if you force us to go to him to seek relief.

MS. MYLES: So you're going to withdraw the pending question as to which there was an instruction?

MR. BROOKEY: No, I think I'll stand on

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the instruction as to that one, but I was talking more prospectively, whether we need to do each question. But let me finish with the ones that don't -- that I think we can all agree don't get into the substance of the document or the privileged information.

Q. Dr. Viscusi, are you familiar with an organization called Eldridge & Lavidge?

A. No.

Q. You have colleagues, don't you, who do work in the field of risk perception?

MS. MYLES: Objection; vague and ambiguous.

THE WITNESS: I do it myself.

MR. BROOKEY: Q. But you're not the only person on the planet to do this type of work; correct? I think we talked a little bit about it before.

A. I just didn't know what you meant by "colleagues."

Q. Maybe that is an inappropriate word.

A. It's a big world.

Q. Actually, let me withdraw that. Let's ask this another way.

You don't conduct your own consumer surveys when you're analyzing risk perception; correct?

A. I'm the project director on every study that's been done for EPA that I've been involved in since 1983. So I'm the principal investigator, project manager. It's my grant. I call the shots. I'm the lead on the project.

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So I'm not sure what you mean. I don't place all the phone calls if it's a telephone interview survey, and I don't bring each individual person into a room to show them different warning labels, but that's not what I call running the survey.

Q. No. I'm sorry. I'm talking about designing the survey.

A. My role is from start to finish. I'm in charge of the whole process.

Q. So you actually write every question that will be asked?

A. I'm involved in the writing of every question, yes.

Q. Okay. When you say you're involved, does that mean that usually other people will assist you in writing the questions?

A. I work with a project team, so it depends on whether it's a joint effort or not. So, for example, the 1991 smoking survey I had sole responsibility for. The Food, Drug & Cosmetic law journal survey reported there I had sole responsibility for.

Q. Now, when you're responsible for a smoking survey as in 1991, do you consider in designing the survey whether a particular question may result in an ambiguous answer that will not be helpful?

MS. MYLES: Objection; overbroad.

MS. SHERIDAN: You've already asked

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questions along this line numerous times earlier today, Brian.

THE WITNESS: I don't like the helpful aspect. What do you mean by "helpful"?

MR. BROOKEY: Q. Well, for instance, you don't want a question to be phrased so ambiguously that you can't make sense of the answer because there's some ambiguity; correct?

A. Depends on what you want to do with the question. Some questions we ask as warmup questions. We don't really care about the answer.

Q. And when you're doing a smoking survey, do you consider on a question-by-question basis whether a particular question is likely to elicit information damaging to the tobacco industry?

A. No.

Q. Okay. In determining whether to include a question in the survey, is your expectation of what an answer might be part of the analysis at all?

MS. MYLES: Objection; vague and ambiguous.

THE WITNESS: I'm not sure what you mean by that, because if you ask the question and people say "I don't know what you mean," sure, I would want to know that.

MR. BROOKEY: Q. Well --

A. That's the answer to the question.

Q. Well, let me try this another way, then. In deciding what a useful question would be in

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consumer survey with respect to environmental tobacco smoke, what criteria would you use?

MR. KAPLAN: Overbroad.

THE WITNESS: It depends on what you're trying to test.

MR. BROOKEY: Q. So there are no objective criteria that cut across all subject areas?

A. I always judge questions relative to what substantive matter you're trying to test, and that varies depending on the question and the context.

Q. Let's say you're trying to test public awareness of Californians of the dangers posed to them by environmental tobacco smoke. What criteria would govern the questions you would include in such a survey?

MS. MYLES: Objection; vague and ambiguous, overbroad.

THE WITNESS: It could go lots of different ways, depending on whether you're interested in whether they'd heard the general statement that environmental tobacco smoke causes cancer or whether you're trying to get an assessment of what is their specific probabilistic belief regarding that.

MR. BROOKEY: Q. Now, you wouldn't want to load the questions with any presuppositions that are harmful to the tobacco industry, would you?

MR. MILES: It's vague and argumentative.

THE WITNESS: I don't load any of my

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surveys, period.

MR. BROOKEY: Q. So, for instance, would you ask a question like: Are you aware that environmental tobacco smoke causes cancer? Would that be a valid question?

MS. MYLES: Objection; vague and ambiguous.

THE WITNESS: Valid for what? That's not the type of question I've ever asked.

MR. BROOKEY: Q. Okay. Why not?

MS. MYLES: Objection; vague and ambiguous, overbroad.

THE WITNESS: The questions I've asked have focused on, first, what have you heard and, second, to rate the risks on an objective risk scale.

MR. BROOKEY: Q. To your knowledge, has the tobacco industry ever asked any consultant or firm to turn over bad survey results to the tobacco industry so those results could be destroyed?

MR. KAPLAN: Asked and answered.

MR. MILES: Assumes facts.

THE WITNESS: Could you repeat the question?

MR. BROOKEY: Can you read it back, please.

(Record read.)

THE WITNESS: To the best of my knowledge, no.

MR. BROOKEY: Q. Would such a request be unethical?

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MR. MILES: Calls for a legal conclusion, vague, calls for speculation, incomplete hypothetical.

THE WITNESS: I don't know who they hired or whether they were any good. Is it -- was it unethical for the U.S. Department of Justice to ask us to return to them the survey information regarding the Exxon Valdez oil spill so that they could destroy it?

MR. BROOKEY: Q. Well, that's a different situation.

A. So I don't think the U.S. Department of Justice as a matter of course commits illegal and unethical acts.

Q. Okay. I'm talking about a situation in which there's a fear that bad survey results will be subpoenaed and used against the industry and designing as a strategy for avoiding the disclosure of that bad information the destruction of information before it falls in potentially hostile hands.

MR. MILES: Calls for speculation, lack of foundation, incomplete hypothetical, argumentative, assumes facts not in evidence, vague.

THE WITNESS: And it also doesn't include possible misuse of survey results, which presumably the U.S. Department of Justice would not be concerned with suppressing bad results, but results that might be misused because the studies were incomplete.

MR. BROOKEY: Q. Okay. I'm talking about if the tobacco industry said or instituted a policy in

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which it said, "We're going to commission surveys, and the bad survey results that we get we're going to have turned over to the lawyers and destroyed if we're subpoenaed, and the good survey results we'll use publicly."

Would that be unethical?

MS. MYLES: Same objections.

MR. MILES: Same objections.

THE WITNESS: I don't understand the context. Every context I've been involved in we've gone with the survey results. Nothing's been destroyed. Everything's been disclosed. In fact, we've disclosed all the data as part of the litigation.

MR. BROOKEY: Q. No. In reporting survey results, have you ever discarded particular questions that yielded answers that were not consistent with your overall result?

MS. MYLES: Objection; vague and ambiguous, overbroad.

THE WITNESS: Are you talking about a smoking survey?

MR. BROOKEY: Q. I'm talking about any survey.

MS. MYLES: Same objections.

THE WITNESS: We pretest surveys. And for example, with the question that we're doing for EPA now, we had one survey question where we got a result

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that we thought was too big the way we posed it. We've written that up, and now we're framing it differently to see if the response is sensitive to the way the question is framed.

MR. BROOKEY: Q. Now, if I were to serve a subpoena to get information regarding that survey question and EPA told you "Quick, destroy all records before you have to comply with that subpoena," would you comply with that request?

MR. MILES: Calls for speculation.

MS. MYLES: Assumes facts not in evidence.

THE WITNESS: Gives EPA the control over our research that they don't have. The agreement is that once we undertake a survey, we have the right to publish it without any prior clearance from EPA.

MR. BROOKEY: Q. And do you have a similar agreement with the tobacco industry?

A. The agreement I have is that once I get the data, that I have the right to do with it whatever I want, to publish whatever I want from it.

Q. And would you want to publish anything that was adverse to the tobacco industry if that's what your data established?

A. I'll pub --

MS. MYLES: Vague and ambiguous, overbroad, assumes facts not in evidence.

MS. SHERIDAN: Calls for speculation.

THE WITNESS: I'll publish whatever is

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suggested by the data that is academically interesting.

MR. BROOKEY: Q. Would it be academically interesting if your data showed that the reality was different from what the tobacco industry would like it to be?

MS. MYLES: Objection; vague and ambiguous, calls for speculation, lacks foundation.

MR. KAPLAN: Incomplete hypothetical.

THE WITNESS: I don't think the academic community cares about what the tobacco industry thinks. So it's whether it's a contribution to new knowledge.

MR. BROOKEY: Q. Do you care about what the tobacco industry thinks?

MR. MILES: Vague, incomplete, calls for speculation.

MS. SHERIDAN: Lacks relevance.

MR. KAPLAN: Overbroad.

THE WITNESS: I don't even know what they think. I mean, I don't even know who the tobacco industry is. The people in the room? Is it, you know, CEOs who -- I don't even know what's going through their heads.

MR. BROOKEY: Q. All right. Have you ever been convicted of a felony, Dr. Viscusi?

A. No.

MR. BROOKEY: I think I'm finished.

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MS. MYLES: I would like to consult briefly before we go off -- before we conclude, but I also would like to request that this deposition, to the extent that Mr. Kaplan's request hasn't been implemented by agreement, that the transcript of this deposition be placed under seal until the privilege issue is resolved with respect to Exhibit 81 and at least one question you incorporated in the contents of the document and subsequent questions you seem to be at least referring to the document in forming your question. And again, it's just until the issue is resolved, we'd like to have -- I'd like to have it placed under seal on behalf of Philip Morris.

MR. KAPLAN: Why don't you let us chat about that, there's probably one or two other things, and we'll come back and let you know.

MR. BROOKEY: Can you release the witness?

MS. MYLES: No, no, because I have -- I'd like to consult for 30 seconds with -- but -- with respect to something that would require the witness's presence.

MR. MILES: Your meter is stopped for now, though. Is that what you're worried about?

(Recess taken.)

(Ms. Sheridan and the witness not present.)

MR. KAPLAN: We can go back on the record. It's about 20 minutes after 6:00 in the evening. The record can reflect that Dr. Viscusi has

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left the deposition.

Counsel have conferred off the record, and defendants will withdraw their request that the exhibit which has been attached to this transcript as Exhibit 81 cause the transcript to be sealed. We will withdraw that request based on Mr. Brookey's representation that he obtained the document off of an Internet site.

The defendants believe that they have preserved the objection related to attorney-client privilege, work product, and joint defense and will stand by those assertions, but not require that the transcript be sealed.

Dr. Viscusi also requested that we indicate to Mr. Brookey that for purposes of payment of the fees, although he testified for certainly more than an additional hour beyond the check that was provided, he's more than happy to accept a check for one additional hour of his fee, which is $500.

MR. BROOKEY: Yeah, I believe so.

I should say I disagree with the characterization that he testified for more than the amount he was paid for, but it's not a significant issue, so we'll take care of getting his additional fee without waiving the right to challenge the appropriateness or reasonableness of any portion of the fee he charged today.

And I think since the witness is gone and

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his counsel is gone, we can't enter into a stipulation governing the transcript.

MR. MILES: The transcript -- I think we can agree that we'll handle it the same way we handled Johnson -- or Sanders. Excuse me. Not Johnson.

MR. BROOKEY: Okay. I guess we should leave on the record that that's subject to disagreement, and if the witness's counsel disagrees for any reason --

MR. MILES: Yeah. If she disagrees, we can ask her tomorrow, but I think it's fairly safe that she will agree to what she agreed to two days ago.

MR. BROOKEY: All right.

MR. KAPLAN: We're done. Thank you.

(Whereupon, the deposition was adjourned at 6:20 p.m.)

--oOo--

I declare under penalty of perjury that the foregoing is true and correct. Subscribed at _____, California, this _____ day of _____, 1999.

_____

W. Kip Viscusi, Ph.D.

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CERTIFICATE OF REPORTER

I, **ANA M. DUB**, RMR, CRR, a Certified Shorthand Reporter, hereby certify that the witness in the foregoing deposition was by me duly sworn to tell the truth, the whole truth, and nothing but the truth in the within-entitled cause;

That said deposition was taken down in shorthand by me, a disinterested person, at the time and place therein stated, and that the testimony of the said witness was thereafter reduced to typewriting, by computer, under my direction and supervision;

I further certify that I am not of counsel or attorney for either or any of the parties to the said deposition, nor in any way interested in the event of this cause, and that I am not related to any of the parties thereto.

DATED: September 24, 1999.

Ana M. Dub

ANA M. DUB, RMR, CRR
CSR No. 7445

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September 24, 1999

W. Kip Viscusi, Ph.D.
c/o Stephanie A. Sheridan, Attorney At Law
Sedgwick, Detert, Moran & Arnold
One Embarcadero Center, 16th Floor
San Francisco, California 94111-3765

In Re: Tobacco Cases II

Dear Dr. Viscusi:

Please be advised that the original transcript of your deposition taken September 22, 1999 in the above-entitled matter is available for reading and signing. The original transcript will be held at the offices of Vail, Christians & Associates, 550 West C Street, Suite 1440, San Diego, CA 92101 (619) 544-8344, for thirty (30) days in accordance with California Code of Civil Procedure Section 2025(q)(1):

> "For 30 days following this notice the deponent, either in person or by a signed letter to the deposition officer, may change the form or the substance of the answer to any question, and may either approve the transcript of the deposition by signing it, or refuse to approve the transcript by not signing it."

If you are represented by counsel in this matter, you may wish to ask your attorney how to proceed. If you are not represented by counsel and wish to review your transcript, please contact our office for a mutually convenient appointment to review your deposition.

Thank you for your cooperation in this matter.

Sincerely yours,

Ana M. Dub, RMR, CRR, CSR No. 7445

cc: Original transcript
Brian K. Brookey, Attorney at Law
Mark N. Todzo, Attorney at Law
Kristin Linsley Myles, Attorney at Law
Stephanie A. Sheridan, Attorney at Law
Michele B. Corash, Attorney at Law
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VISCUSI
EXHIBIT NO. 79
1-22-99
ANA DUB, CSR, CRR

I, W. Kip Viscusi, declare:

1. All matters contained in this declaration are true of my own knowledge. If called as an expert witness, I could and would testify regarding the matters contained therein.

Professional Background

2. I am the John F. Cogan, Jr. Professor of Law and Economics and the Director of the Program on Empirical Legal Studies at Harvard Law School. I have also been a chaired professor at Duke University, a full professor at Northwestern University, and a visiting professor at the University of Chicago.

3. I hold four degrees from Harvard University, including: A.B. in economics (*summa cum laude* and Phi Beta Kappa), M.P.P. in public policy, A.M. in economics, and Ph.D. in economics. I received the awards for best undergraduate thesis and best graduate dissertation in economics.

4. My research has focused primarily on individual and societal responses to risk and uncertainty, including the effects of risk communication. I have published 17 books and over 200 articles, where most of these publications have been peer reviewed. These books and articles have received numerous awards.

5. My policy involvement in risk and regulatory matters has been extensive. In the Carter Administration, I was Deputy Director of the President's Council on Wage and Price Stability, which was responsible for White House oversight of all major new regulations. I recently completed seven years of service (the term limit) on the EPA Science Advisory Board. In 1994 I was a consultant to EPA on public smoking restrictions. I have also done work on risk-related issues for agencies throughout the Federal government.

6. My professional activities have involved substantial involvement with the peer review process and the application of scientific norms in evaluating research, including that dealing with smoking. I currently hold ten editorial positions, including serving on the editorial boards of two of the most prestigious economics journals, the *American Economic Review* and the *Review of Economics and Statistics*. I am also the Founding Editor of the *Journal of Risk and Uncertainty*, which is the leading interdisciplinary journal focusing on

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individual and societal responses to risk.

7. These professional activities have involved considerable work specifically on hazard warnings and risk communication generally. Three of my books and many of my articles deal exclusively with hazard warnings and informational regulations. Most of my work for EPA, which has supported my research continuously since 1983, has focused on the development of hazard warning criteria to provide guidance to the EPA. My recent risk information paper, which was prepared under a grant from EPA, received the 1999 Royal Economic Society Prize. In 1982 I was asked by the Secretary of Labor and the U.S. Office of Management Budget to settle the dispute between OSHA and OMB over the proposed OSHA hazard communication regulation, which had been appealed to then Vice President Bush. The day after my report in support of the proposal reached the White House, the regulation was approved. In 1988 I testified before the U.S. Senate on proposed alcoholic beverage warnings. I also testified as a hazard warnings expert in California Proposition 65 litigation. I have served as an Associate Reporter on hazard warnings issues for the American Law Institute tort liability project. Finally, my hazard warnings work has included consulting on the design of warnings now used on nationally marketed consumer products.

Criteria for Evaluating Risk Communication Efforts

8. Risk communication serves as an intermediate policy mechanism when direct regulation or a product ban is not warranted or feasible. The promotion of choice through informational regulations is an attractive feature that avoids unnecessary inefficiencies. Informational efforts recognize that there may be heterogeneity in preferences (e.g., people's willingness to wear rubber gloves or the enjoyment derived from smoking) or heterogeneity in riskiness (e.g., the degree of ventilation in a smoker's home or the presence of sensitive populations such as children). See Viscusi and Magat, *Learning About Risk* (Harvard University Press, 1987), Magat and Viscusi, *Informational Approaches to Regulation* (MIT Press, 1992), and Viscusi, *Smoking: Making the Risky Decision* (Oxford University Press, 1992). Informational regulations also are effective in decentralized situations where behavior cannot be monitored.

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9. The policy objective of informational policies such as Proposition 65, is informed rational choice. These choices can pertain with respect to discrete choices of jobs and risky activities or the choice of individual precautions within these activities. See the American Law Institute, *Enterprise Responsibility for Personal Injury* (Philadelphia: America Law Institute, 1991). The objective of informed choice differs from Professor Johnson's stated objective of modifying behavior. Moreover, informed choice is not the same as generating public alarm or increasing risk beliefs. The policy objective is to have individuals develop accurate perceptions of the risks so as to have an informed basis for their decisions, which may or may not involve risky behaviors. Informational efforts are not necessary if risk beliefs are already adequate.

10. The reference point for assessing the welfare consequences is to assess the benefits and costs to all parties. Precautions often are costly (see Viscusi and Magat (1987) and Magat and Viscusi (1992)), and fully protective behavior may not be efficient. In the case of environmental tobacco smoke, the costs of smoking restrictions include the welfare loss to the smokers themselves, where the economic value of this loss may be substantial. See Viscusi, "Secondhand Smoke: Facts and Fantasy," *Regulation*, 1995.

11. Judgment of the efficacy of hazard warnings efforts is not an arbitrary exercise based merely on conjecture. As in the case of other scientific evidence, there is an established scientific literature on the efficacy of risk communication policies. These scientific studies are in professional, peer reviewed journals and books and can provide a valid scientific basis for risk communication rather than relying on conjecture, as does Professor Johnson. The scientific evidence consists of controlled experiments and natural experiments that take into account the multiplicity of factors that may affect risk behavior. Such controls are necessary to avoid imputing causality to risk information in contexts where multiple influences are at work, as Professor Johnson does when he imputes declines in drug use to specific drug information campaigns.

12. The appropriate standpoint for evaluation is the entire hazard communication system, including all pertinent sources of information. See the American Law Institute (1991)

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and Viscusi, *Reforming Products Liability* (Harvard University Press, 1991). It is not appropriate to isolate a particular source of information such as a hazard warning or a media campaign. What is of consequence is the entire set of information available to the individual and whether it leads to accurate risk beliefs.

Effective warnings are those that provide new information in a convincing manner. The information must be new in the sense of altering risk beliefs toward a more accurate risk beliefs. Thus, risk perception probabilities are altered in the direction of the true probabilities. To be convincing, risk information must be credible and have informational content. The extent of informational content and the risk probabilities implied can, in some cases, be estimated empirically. See, for example, Viscusi and O'Connor, "Adaptive Responses to Chemical Labeling: Are Workers Bayesian Decision Makers?" *American Economic Review*, 1984; Viscusi, *Rational Risk Policy* (Oxford University press, 1998); Viscusi and Magat (1987); and Magat and Viscusi (1992); Viscusi and Magat, "Bayesian Decisions with Ambiguous Belief Aversion," *Journal of Risk and Uncertainty*, 1992. Thus, these criteria are based on scientific evidence and empirical evaluations of warnings.

13. A corollary to this new information principle is that warnings that do not have new informational content will not serve a constructive role. Warnings that serve as reminders consequently will not alter risk beliefs or behavior. The "buckle up for safety" campaign cited by Professor Johnson as being effective is in fact a model of an ineffective campaign because of its failure to provide new information. Information campaigns can work, but they can also fail. In addition to the studies cited above, see Adler and Pittle, "Cajolery or Command: Are Education Campaigns an Adequate Substitute for Regulation?" *Yale Journal on Regulation*, 1984.

14. Hazard warnings policies can create potential dangers as well as benefits. In addition to distorting risk beliefs, there are two classic problems with overwarning. First, there is the danger of label clutter for any particular warning. People can process reliably only 4-5 pieces of information from any given warning. Second, there is the danger of information overload across products and activities. If every minor hazard merits a warning,

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then consumers will be inundated with warnings. Excessive warnings will impede people's ability to draw distinctions between what is risky and what is not. In addition, alarmist warnings that distort the assessment of a particular risk, raising the risk belief above the true risk level, have several adverse effects. First, people may be overly deterred from that risky activity. Second, by claiming that a minor risk is truly consequential, such alarmist policies may lead people to believe truly important risks are also only minor because alarmist warnings have distorted relative risk comparisons. Third, alarmist warnings undermine the credibility of warnings policy generally. The implication of these findings for environmental tobacco smoke is that alarmist warnings to change behavior should not be our goal. Rather we should seek to ascertain whether there is appropriate risk awareness. See Magat and Viscusi (1987) and Viscusi and Magat (1992).

Smoking Risk Information

15. There is considerable public information about smoking that has been disseminated by the media. Since the 1950s the number of smoking related articles appearing in *Reader's Digest* has risen each decade. The total Lexis article counts for cigarettes, smoking, and tobacco have each risen from levels such as 3,000 in the 1980s to over 14,000 annually by the late 1990s.

16. This increased publicity regarding smoking has been fostered by governmental smoking efforts. In 1964 and on an annual basis beginning in 1967 the U.S. Surgeon General has issued reports on the hazards of smoking, including involuntary smoking through environmental tobacco smoke. OSHA and EPA have also launched proposed initiatives pertaining to environmental tobacco smoke, where these efforts also create public awareness. See Viscusi, *Smoking: Making the Risky Decision* (1992). The state of California has undertaken informational policies discussed below as well as a ban of smoking in restaurants and bars, which was front page news throughout California. Moreover, 79% of Californians were aware that there was less smoking after a 1995 law prohibited smoking in work areas other than bars/taverns. See The Gallup Organization, "A Survey of California's Law For a Smokefree Workplace (AB 13): Attitudes after the First Year of Implementation," March

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1996.

17. National warnings requirements affect the labels required on cigarettes and cigarette advertising available to the general public. See 15 U.S.C. §§ 1331-1341 (1982). Beginning in 1965 these warnings stated: "Caution: Cigarette Smoking May Be Hazardous to Your Health," and in 1969 the required warning became: "Warning: The Surgeon General Has Determined That Cigarette Smoking Is Dangerous to Your Health." Congress mandated a series of four rotating warnings beginning in 1984 to warn of the risks of "Smoking" in three of the warnings and "Cigarette Smoke" in a fourth label. Government regulations also severely limit the health claims that can be made on behalf of cigarettes, thus ensuring that the salient health message be to convey that the product is hazardous.

18. As a result of the settlement of the state attorneys general suits, there is now a prohibition on cigarette advertising except in adult facilities and publications. This agreement also provides for substantial industry funding of anti-tobacco education efforts as well as over $200 billion to the 46 participating states for policies including anti-smoking campaigns. The dominant advertising health message will clearly be that cigarette smoke is dangerous.

19. Under California Proposition 65 warning signs were posted in locations where smoking was permitted beginning no later than April 1, 1989. These signs were in restaurants, bars, outside smoking lounges, and in other public areas. The text of the warnings was: "WARNING: This Facility Permits Smoking, and Tobacco Smoke Is Known to the State of California to Cause Cancer" and "WARNING: This Area Contains Chemicals Known to the State Of California to Cause Cancer, Birth Defects or Other Reproductive Harm." Thousands of these warning signs were posted throughout the state of California. See Richard C. Paddock, "Nonsmoker Warning Signs Due Up Saturday," *L.A. Times*, March 31, 1989, pp. 3 and 26, which is attached hereto as Exhibit 1. In addition, the warnings language of Proposition 65 contains language that conveys a much higher risk than is in fact present. For empirical evidence, see Viscusi, "Predicting the Effects of Food Cancer Warnings on Consumers," *Food Drug Cosmetic Law Review*, 1988, and Magat and Viscusi (1992). Thus, the warning was widely available and conveyed a very strong message.

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20. Although the smoking ban in restaurants and bars led to the removal of the warnings in some locations, the fact that environmental tobacco smoke is viewed by the state of California as being hazardous enough to warrant such a ban in itself provides an informational signal to people. Awareness of the ban on smoking in bars is almost universal among bar patrons, as 98% have heard of the California law prohibiting smoking in bars. Moreover, 71% of nonsmokers approve strongly or approve somewhat of the ban. The ban was front page news so there was wider awareness as well. See Field Research Corporation, "A Survey of California Bar Patrons About Smoking Policies and Smoke-Free Bars," March 1998, Tables 7 and 8.

21. The state of California has undertaken vigorous anti-smoking campaigns in the media and in schools beginning in 1988 with the passage of Proposition 99, which taxes cigarettes and uses these funds for anti-smoking efforts. The U.S. CDC has ranked the program in California as being among the most effective of any state. These efforts have included community programs, school programs, statewide media campaigns, and grants for tobacco control projects. Many publications and videos are made available through schools, health agencies, community groups, and other organizations, such as the American Lung Association and the American Heart Association. These materials are often targeted at specific audiences (e.g., videos in Spanish, Korean, and Cantonese). See California Department of Health Services, Tobacco Control Section, *Catalog of Tobacco Education Materials*, Spring/Summer 1998. Also see Tobacco Education Clearinghouse of California *1999, Catalog of Tobacco Cessation Materials*. I have also reviewed videos of the television ads both in English and Spanish as well as the radio spots, all of which convey strong anti-smoking and/or anti-ETS messages, and have received national attention. See California Center for Health Improvement, "California's Anti-Tobacco Strategy," and California Department of Health Services and California Department of Education *Toward a Tobacco Free California*, December 1990, April 1992, February 1993, and 1997 reports. As indicated in the 1992 report, these efforts have involved schools, public health departments, physicians, voluntary agencies, dental health professionals, health care institutions, the media, employers,

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and grant recipients. Also see California Department of Health Services, *California Tobacco Education Project Directory*, 1997-1998 edition and 1998-1999 edition, and the California Department of Health Services *Agency/project Index* for a summary of the dozens of anti-tobacco efforts targeted at a wide range of age groups, nationalities, and communities.

22. Education of youths with respect to the hazards of tobacco smoke has occurred through the general media coverage as well as textbook materials used in schools as well as through teacher presentations. These textbooks discuss the role of cigarette smoke generally as well as the risks of ETS. For example, the "Tobacco" chapter in the text used in California written by Ted Tsumura, *Health and Safety for You* (McGraw-Hill, 1987), p. 263, states: "**Passive (involuntary) smoking** occurs when a nonsmoker unwillingly inhales smoke from a burning cigarette, cigar, or pipe. In a smoky environment, the nonsmoker breathes many of the same particles in tobacco smoke that a smoker inhales. The chemical components in smoke-filled surroundings come from two sources—mainstream and sidestream smoke. **Mainstream smoke** is the smoke inhaled then exhaled by the smoker. **Sidestream smoke** is the smoke that goes directly into the air from the burning end of a cigarette, cigar, or pipe. Sidestream smoke can be seen, for example, when a cigarette is burning in an ashtray. The sidestream smoke is not filtered in any way. Many substances, including those known to cause cancer, are therefore found in much higher concentrations in sidestream smoke than in mainstream smoke."

Similarly, the "Tobacco" chapter in *Health* (Prentice-Hall, 1997) has an extensive discussion of passive smoking, including the following summary statistics (p 480):

"Sidestream Smoke: The Grim Statistics

- As many as 3,000 lung cancer deaths annually are caused by sidestream smoke.
- The concentration of carbon monoxide is 2.5 times higher in sidestream smoke than it is in mainstream smoke.
- Nonsmokers exposed to 20 or more cigarettes a day at home are twice as likely to develop lung cancer.
- Nonsmokers married to heavy smokers are two to three times more likely to

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develop lung cancer than those married to nonsmokers.

- Up to one million existing cases of childhood asthma get worse each year due to passive smoking.
- Passive smoking increases the risk of heart disorders, triggering 35,000 deaths a year."

23. The public health community, stimulated in part by Proposition 99 grants, has disseminated brochures and pamphlets on environmental tobacco smoke. A summary of the extensive efforts by a large number of California health departments and health organizations appears in Tobacco Education Clearinghouse of California, *Tobacco Education Resource Directory, A Description of Projects Funded by the California Department of Health Services*, 1992-1993 Edition, among other sources.

Smoking Risk Beliefs

24. Smokers overestimate the risks to themselves of cigarettes. This result accords with the more general phenomenon that highly publicized risks are overestimated. Nonsmokers overestimate these risks even more. There is no evidence that the young underestimate the risks, as their risk beliefs are as high or higher than adults. Minorities and the less well educated also have risk perceptions as high or higher than the white population and those who have more education. Each of these empirical results contradicts the unsupported assertions by Professor Johnson about minorities and people with less education. For example, in a 1997 national survey, respondents assessed the premature mortality risk due to smoking as .54 if they were high school dropouts, .50 if they had a high school diploma, and .50 if they had at least a college degree. Similarly, whites had a perceived probability of death of .50, and minorities had a perceived probability of .51. The risk overestimation results hold true for lung cancer risks, total mortality risks, and losses to life expectancy. See Viscusi, *Smoking* (1992), Viscusi, "Do Smokers Underestimate Risks?" *Journal of Political Economy* 1990; Viscusi, "Age Variations in Risk Perceptions and Smoking Decisions," *Review of Economics and Statistics*, 1991; Viscusi, "Constructive Risk Regulation," *Duke Law Journal*, 1998; 1997 Audits and Surveys Worldwide smoking survey; and 1998 Roper Starch

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Massachusetts smoking survey. To the best of my knowledge, these are the only surveys that provide valid quantitative assessments of risk beliefs that permit one to ascertain whether people underestimate or overestimate the risk.

Similar evidence is available for minorities in California. "In 1993, more than three quarters of California children were protected from ETS exposure in the home. Rates of protection were particularly high for Hispanic, black, and Asian youth." See UCSD Cancer Prevention and Control Program, A Report to the California Department of Health Services, *Tobacco Use in California: Regional vs State Level Changes, 1990-1993 Contra Costa County*, 1994, p. 72. Since Professor Johnson suggests that minorities are more likely to be housed in settings leading to ETS exposures, these lower exposure rates are presumably reflective of greater self protection and risk beliefs.

25. To the extent that anti-smoking efforts have equated environmental tobacco smoke and smoking risks, there would be no distinctions made and people would also tend to estimate substantial risks of environmental tobacco smoke (ETS), far in excess of what scientific evidence suggests, as these studies fail to show a statistically significant lung cancer risk at the conventional 95 percent confidence level.

26. Public awareness of ETS risks has been rising over time. National Gallup polls in 1978 found that only 43% of respondents favored banning smoking on commercial airplanes, but by 1988 60 percent of all respondents favored a complete ban on smoking in all public places. See Viscusi, *Smoking*. More recent evidence in a 1995 California Field Poll found that 86% of all respondents believed that work sites should be smoke-free and 85 percent preferred smoke-free restaurants. By 1995, 86.9% of nonsmokers believed that ETS caused lung cancer, and 95.4% believed that ETS harmed the health of babies and children. See the California Department of Health Services Tobacco Control Section, "What Californians Believe about Tobacco Smoke," June 1996. Also see California Department of Health Services Tobacco Control Section, "What Californians Believe About Environmental Tobacco Smoke," August 1995. The Gallup-Stanford-USC report found: "In 1996, community awareness of the dangers of ETS remained extremely high with 89% of adults and

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97% of 10th-grade youth believing that breathing secondhand smoke is bad for your health" (p. 43). Moreover, the report concludes: "The public is transferring lessons learned about exposure to secondhand smoke to smoking policies in their homes and cars." (p. 50). See *Final Report: Independent Evaluation of the California Tobacco Control Prevention and Education Program: Wave/Data, 1996-1997* by the Gallup Organization, Stanford University, and U.S.C. for the State of California Department of Health Services Tobacco Control Section, 1999.

27. In Proposition 65 the California voters declared their right to be "informed about exposures to chemicals that cause cancer, birth defects, or other reproductive harm." Available evidence indicates that there is almost universal risk awareness about the reported risk of tobacco smoke and ETS to nonsmokers. Thus, Calfornians have been informed about ETS. To the extent that people are not "informed," it is that they may overestimate the actual risk level. There is no need for the cigarette industry to augment current efforts with an additional public education campaign.

28. Professor Johnson's policy proposal of warnings messages to reach 95% of Californians at least 3 times every four weeks is without scientific foundation. His concluding proposed remedy is completely arbitrary and is not based on documentation of informational inadequacies or the efficacy of this proposal in remedying such inadequacies.

29. If there has been public controversy regarding the magnitude of ETS risks, then the public will not ignore these hazards. Disagreements between different expert organizations about the size of the risk will lead the public to place the greatest weight on the high risk assessment, or the worst case scenario. See Viscusi, "Alarmist Decisions with Divergent Risk Information," *The Economic Journal* (1997).

30. Additional warnings would serve no constructive role. There is broad understanding of the hazards of cigarette smoke, and Californians in particular have been inundated with anti-tobacco and ETS messages. Redundant warnings that do not provide new information not only serve no constructive role but clutter the informational space, distracting people's attention from the hazard communication efforts that have a more constructive

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function.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on this 14th day of September, 1999, at Cambridge, MA

W. Kip Viscusi

W. KIP VISCUSI

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Higher Education:

A.B., Harvard College, economics major, Harvard University, 6/71.

M.P.P., Public Policy Program, Kennedy School of Government, Harvard University, 6/73.

A.M., Department of Economics, Harvard University, 6/74.

Ph.D., Department of Economics, Harvard University, 11/76.

Principal Awards:

Harvard College and John Harvard Honorary Scholarships, 1967-1971.

Summa cum laude and Phi Beta Kappa, Harvard College.

Allyn A. Young Prize for best Harvard undergraduate economics honors thesis, 1970-71, Selected Topics in Public Expenditure Analysis: The Economic Evaluation of Water Resources Projects.

David A. Wells Prize for best Harvard economics Ph.D. dissertation 1975-1976, Employment Hazards: An Investigation of Market Performance.

Prize Winner in Economics of Labor Unions Essay Contest, Center for Study of Public Choice, Virginia Polytechnic Institute and State University, 1979, for "Unions, Labor Market Structure, and the Welfare Implications of the Quality of Work," Journal of Labor Research, Vol. 1, No.1 (1980).

Best Article of the Year Award, Western Economic Association, "The Quantity - Adjusted Value of Life," with Michael J. Moore, Economic Inquiry, Vol. 26, No. 3 (1988).

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Kulp Award for Outstanding Original Contribution to the Literature of Risk and Insurance, American Risk and Insurance Association, book of the year, 1992, for Compensation Mechanisms for Job Risks, with Michael J. Moore.

Kulp Award for Outstanding Original Contribution to the Literature of Risk and Insurance, American Risk and Insurance Association, book of the year, 1993, for Reforming Products Liability.

Kulp Award for Outstanding Original Contribution to the Literature of Risk and Insurance, American Risk and Insurance Association, book of the year, 1994, for Fatal Tradeoffs.

Ranked by Economic Inquiry (April 1996) as the second most prolific economist based on articles published over the past decade in the top 36 economics journals.

Ranked by the Journal of Risk and Insurance (Sept. 1997) as the most cited paper in the Journal of Risk and Insurance and the second most cited paper in insurance and actuarial journals overall, 1991-1995, for "Price and Availability Tradeoffs of Automobile Insurance Regulation," with H. Grabowski and W. Evans, JRI (June 1989).

Royal Economic Society Prize for 1999, "Alarmist Decisions with Divergent Risk Information," Economic Journal, Vol. 107, No. 445 (1997).

Ranked by Journal of Risk and Insurance (December 1998) as the most productive contributor to the risk and insurance literature from 1987-1996 based on published pages in SSCI-indexed journals, pages in impact-weighted journals, and pages in impact-weighted journals adjusted for co-authorship.

Mehr Award for Lasting Contribution to the Risk and Insurance Literature, American Risk and Insurance Association, 1999, for "Price and Availability Tradeoffs of Automobile Insurance Regulation," with H. Grabowski and W. Evans, JRI (June 1989).

Principal Full-Time Positions:

Harvard University, 1973-1976. Instructor in Public Policy, Kennedy School of Government.

Northwestern University, 1976-1980. Assistant Professor of Economics, 1976-1978; Associate Professor of Economics (with tenure), 1979-1981. On leave in the government 1979-1981.

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Council on Wage and Price Stability, Executive Office of the President, Deputy Director, 1979-1981; Economic Policy Group deputy, Regulatory Analysis Review Group member.

National Commission for Employment Policy, Washington, D.C., Research Associate, 1981.

Duke University, 1981-1985. Professor of Business Administration, Fuqua School of Business (primary appointment); joint appointments in Institute of Policy Sciences, School of Law, and Department of Economics; Director of the Center for the Study of Business Regulation.

University of Chicago, 1985-1986. Olin Visiting Research Professor of Economics, Center for the Study of the Economy and the State, Graduate School of Business.

Northwestern University, 1985-1988. Professor of Economics.

Duke University, 1988-1996. George G. Allen Professor of Economics.

Harvard Law School, 1995. Olin Visiting Professor of Law and Economics.

Harvard University, 1996-present. John F. Cogan, Jr. Professor of Law and Economics. Harvard Law School. Director of the Program on Empirical Legal Studies.

Other Professional Activities:

National Academy of Sciences, Panel on Aging and Society, member, 1978-1979.

National Bureau of Economic Research, 1978-1988; 1995-. Research Associate.

American Law Institute Project on Enterprise Liability for Personal Injury, chief economic consultant and academic working group member, 1986-1987; Associate Reporter, 1988-1991.

Brookings Institution, Civil Liability Project, member, 1986-1987; Product Liability and Innovation Project, member, 1990.

Industry Publications

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U.S. Environmental Protection Agency, Science Advisory Board Clean Air Scientific Advisory Committee: Review Subcommittee -- Acid Rain (1986) and Lead Pollution (1987), member/consultant. Member: Environmental Economics Advisory Committee (1992 - 1998) and Clean Air Act Compliance Analysis Council (1992 - 1996; consultant, 1997 - present). Consultant on public smoking restrictions (1994).

Corresponding Group on Safety Policy, Royal Society of Canada and Canadian Academy of Engineering, 1992 - present.

Adjunct Scholar, American Enterprise Institute, 1993-present.

Wharton School, Public Management External Review Committee, 1994, and Advisory Board, Risk and Decision Processes Center, 1994-present.

Board of Academic Advisors, American Enterprise Institute-Brookings Institution Joint Center for Regulatory Studies, 1998-present.

Board of Advisors, Regulatory Studies Program, George Mason University, 1999-present.

Editorial Positions:

Public Policy, Assistant Editor, 1974-1976.

Regulation, Contributing Editor (American Enterprise Institute), 1986-1988; Editorial Council (Cato Institute), 1989-Present.

Journal of Risk and Uncertainty, Founding Editor, 1987-present; Vol. 1-2 (with Mark Machina); Vol. 3 - present (sole editor).

International Review of Law and Economics, Associate Editor, 1987-present.

Journal of Regulatory Economics, Associate Editor, 1988-1992.

Geneva Papers on Risk & Insurance Theory, Associate Editor, 1990-present.

Book Series on Risk and Uncertainty, Kluwer Academic Publishers, Founding Editor, 1990-present.

Journal of Environmental Economics & Management, Editorial Council, 1992-1996.

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Journal of Risk and Insurance, Associate Editor, 1992-present.

Review of Economics and Statistics, Associate Editor, 1992-present.

American Economic Review, Board of Editors, 1994-present.

Managerial and Decision Economics, Advisory Board, 1996-present.

Torts Abstracts Journal, ESN, Advisory Board, 1998-present.

Other Positions:

Center for Study of Responsive Law, report editor and co-author, Washington, D.C., 1970-1972.

Rand Corporation, Santa Monica, CA., consultant, summer 1972, 1987-1990.

Fellowships, Grants, and Government Research Contracts:

Institute of Politics, Harvard University, thesis research grant, 1970.

Kennedy School of Government, Harvard University, Administration Fellowship, 1971-1972.

National Science Foundation, Grant Fellowship, 1972-1975.

U.S. Department of Labor, Manpower Dissertation Fellowship, 1975-1976.

Project director, miscellaneous contracts and purchase orders: U.S. Dept. of Labor, OSHA, 1976-1977, 1981-1983, 1985; ASPER, 1982.

Rockefeller Foundation Grant, project director, 1978-1981.

National Commission for Employment Policy, research contracts, 1981-1983.

U.S. General Accounting Office, consulting contract 1981-1985.

National Science Foundation Grant (consumer product safety, project director), 1983-1984.

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U.S. Office of Management & Budget, consulting contract (disease compensation), 1983.

U.S. Environmental Protection Agency, Cooperative Agreement (information), project manager and principal investigator, two project periods, 1983-1986.

U.S. Environmental Protection Agency, Cooperative Agreement (enforcement of water pollution standards), project manager and principal investigator, 1984-1986.

U.S. Environmental Protection Agency, Cooperative Agreements (risk information and environmental regulation enforcement), project manager and principal investigator, two project periods, 1986-present.

U.S. Environmental Protection Agency, Cooperative Agreements (morbidity risk valuation), project manager and principal investigator, two project periods, 1987-1990.

U.S. Environmental Protection Agency, Cooperative Agreement (risk communication), project manager and principal investigator, 1988-1992.

U.S. Department of Justice, consultant and expert witness: Civil Rights Division, 1986-1987; Torts Division, 1986-1992; Land and Natural Resources Division, 1989-1992 (Exxon Valdez).

National Science Foundation Research Grant (product liability and innovation), project manager and principal investigator, 1989-1991.

Roscoe Pound Foundation Fellowship (punitive damages), co-principal investigator, 1989-1990.

National Science Foundation Research Grant (product liability insurance market), project manager and principal investigator, 1990-1992.

U.S. Environmental Protection Agency, Cooperative Agreement, project manager and principal investigator (efficient energy pricing), 1990-1991; 1991-1993.

National Oceanic and Atmospheric Administration, consultant, 1990-1991 (oil spills).

U.S. Environmental Protection Agency, Cooperative Agreements (morbidity risk analysis, sources of individual risk), project manager and principal investigator, 1991-1995.

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U.S. Environmental Protection Agency, Research Grant (risk communication), project manager and principal investigator, 1991-1993.

Executive Office of the President, consulting contract (wealth effects and risk policy analysis), 1992.

U.S. Environmental Protection Agency, Cooperative Agreement (Superfund), project manager and principal investigator, 1993-1995.

U.S. Environmental Protection Agency, Cooperative Agreements (Superfund, risk analysis, national water quality benefits, environmental subsidies, climate change) project manager and principal investigator, 1994-present.

U.S. Environmental Protection Agency Cooperative Agreement (benefits of environmental improvements), project manager and principal investigator, 1999-present.

Principal Seminars and Honorary Lectures:

Inaugural Speaker, Geneva Risk Economics Lectures, Geneva Association for Risk and Insurance, "Social Insurance for Work and Product Injuries," Paris, 1989.

John R. Commons Lecture, Third Annual Lecture, "Lessons from Workers' Compensation for Tort Liability Reform," University of Wisconsin - Madison, 1990.

Faculty Member, George Mason Law School Programs for Federal Judges, Science and Liability (1991, 1992, 1993, 1996, 1998, 1999), Product Liability (1992, 1993, 1994, 1996).

Keynote Speaker, European Association of Environmental and Resource Economists, (EAERE), Fourth Annual Conference, Paris, 1993.

Smith Endowed Chair of Economics Lectures, Brigham Young University, 1993.

Keynote Speaker, Australian Conference on Risk, Regulation, and Responsibility, Institute for Public Affairs and Australian National University, Sydney, 1995.

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Faculty Member, University of Kansas Law School Program for State Judges -- torts, crimes, and deterrence; cost-benefit analysis and risk assessment, and labor markets (1995, 1996, 1997, 1999).

Arne Ryde Memorial Lectures, University of Lund, Sweden, May 1996.

Ray Rushton Distinguished Lecture, Cumberland School of Law, February 1999.

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September 7, 1999

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Welfare of the Elderly: An Economic Analysis and Policy Prescription (New York: Wiley-Interscience, 1979).

Employment Hazards: An Investigation of Market Performance, Harvard Economic Studies No. 148 (Cambridge: Harvard University Press, 1979). Winner of the David Wells Prize for outstanding economics dissertation, Harvard University.

Risk by Choice: Regulating Health and Safety in the Workplace (Cambridge: Harvard University Press, 1983).

Regulating Consumer Product Safety (Washington: American Enterprise Institute, 1984), in hardcover and paperback.

Learning about Risk: Consumer and Worker Responses to Hazard Information, principal author with Wesley A. Magat (Cambridge: Harvard University Press, 1987).

Compensation Mechanisms for Job Risks: Wages, Workers' Compensation and Product Liability, with Michael J. Moore (Princeton: Princeton University Press, 1990). Winner of Kulp Memorial Award, best book of 1992, American Risk and Insurance Association.

Enterprise Responsibility for Personal Injury -- Reporters' Study, Vol. I: The Institutional Framework and Vol.II: Approaches to Legal and Institutional Change, Associate Reporter, with Paul Weiler, et al. (Philadelphia: American Law Institute, 1991).

Reforming Products Liability (Cambridge: Harvard University Press, 1991). Winner of Kulp Memorial Award, best book of 1993, American Risk and Insurance Association.

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Fatal Tradeoffs: Public and Private Responsibilities for Risk (New York: Oxford University Press, 1992); paperback edition, 1995. Winner of the Kulp Memorial Award, best book of 1994, American Risk and Insurance Association.

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Product-Risk Labeling: A Federal Responsibility (Washington: American Enterprise Institute, 1993).

The Mortality Costs of Regulatory Expenditures, editor (Boston: Kluwer Academic Publishers, 1994).

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Los Angeles Times

Friday, March 31, 1989

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...ST STEINBROOK, ...al Writer

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...NORMAN KARL / Los Angeles Times

Oil-fouled rocks on Seal Island in Prince William Sound, and a dying bird that struggled ashore.

Baker Challenges Soviet Latin Policy

Warns Moscow Not to Export Arms, Ideology to Central, South America

By NORMAN KEMPSTER, Times Staff Writer

WASHINGTON—Secretary of State James A. Baker III, in a challenge to Soviet President Mikhail S. Gorbachev who visits Havana next week, said Thursday that the democracies of the Western Hemisphere are determined to prevent Moscow and its allies from using Latin America as "a dumping ground for their arms or their failed ideologies."

Setting out Gorbachev's "new thinking" examples, Baker called on Moscow to apply new ideas to Central America by abandoning its $500-million-a-year program of military aid to the Sandinista government in Nicaragua.

Meanwhile, White House Press Secretary Marlin Fitzwater said President Bush has made clear that Soviet restraint in Central America would "have a [favorable] impact in terms of our overall relationship." Fitzwater said that the U.S. view has been communicated to Gorbachev, who arrives in Havana on Sunday at the start of a three-day visit, but he declined to say how the message was sent.

Baker's remarks came in a speech to a seminar on Western Hemisphere affairs at former President Jimmy Carter's Presidential Center in Atlanta. The text was made public by the State Department in Washington.

...

Legally Drunk Ship's Captain Fired by Exxon

By DAVID LAUTER, Times Staff Writer

WASHINGTON—The National Transportation Safety Board reported Thursday that the captain of the Exxon Valdez was legally drunk when he was tested some 10 hours after his tanker hit a reef last week, causing the worst oil spill in U.S. history.

After the NTSB's announcement, Exxon officials confirmed that they had fired the captain, 47-year-old Joseph Hazelwood, although investigators could not determine whether he had been drinking on the job.

...Coast Guard Commandant Paul ...ime to "demand alcoholic ...the day the Exxon Valdez ...ctsyrael hitting a 10-mile-wide ...ping channel, ran aground into Bligh ...Reef. "This was not a ...ment ...he said. "...circumstances ...could defeat human ...precaution."

Court Limits Insurers' Risk on Home Damage

State Justices Rule That Companies Must Pay Only When Policy Covers Primary Cause of Loss

$2.6 Billion Bid for NW Airlines by Marvin Davis

By DIRK BEVELLE, Times Staff Writer

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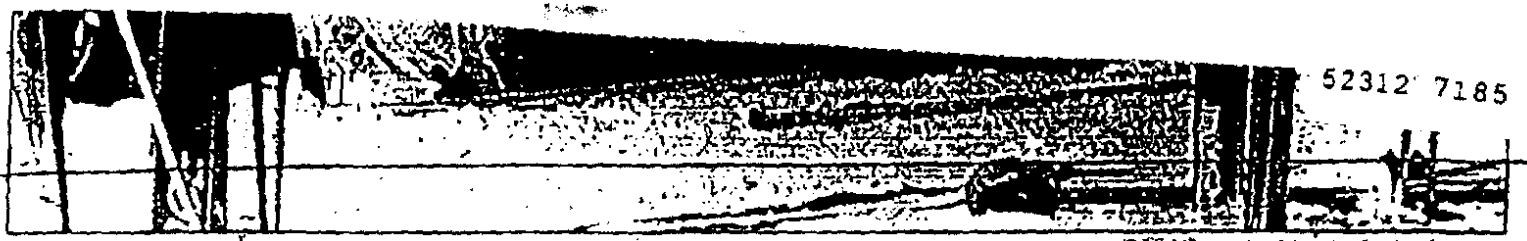

CON KEYES / Los Angeles Times

Michael Banks of Newport Beach and brother Eric of Huntington Beach kick back on skis to enjoy sun at Mammoth.

Nonsmoker Warnings Due Up Saturday

By RICHARD C. PADDOCK, *Times Staff Writer*

SACRAMENTO—Thousands of signs warning nonsmokers that second-hand tobacco smoke can cause cancer will begin appearing Saturday in restaurants, bars and hotels throughout the state as a result of Proposition 65, the anti-toxics initiative.

The notices, which will be posted near the entrances of establishments and workplaces where smoking is allowed, are believed to be the first government-required health warnings to alert the public to the hazards of breathing secondary smoke.

The state-approved placards will read: "Warning: This Facility Permits Smoking and Tobacco Smoke Is Known to the State of California to Cause Cancer."

"We are printing signs by the thousands and shipping them off to our members all over the state," said Jo Linda Thompson, a spokeswoman for the California Restaurant Assn. "We've been printing and mailing all week long."

State Health and Welfare Undersecretary Thomas E. Warriner, who is overseeing the implementation of Proposition 65, said he expects broad compliance from restaurants, hotels and businesses that allow smoking on their premises. Some firms, he said, may simply prohibit smoking altogether as a way of avoiding the warning requirement.

"A company might decide now is a good time to go nonsmoking," Warriner said.

Proposition 65, which was overwhelmingly approved by the voters in 1988, was primarily intended to ensure that Californians can drink water that is free from contamination by toxic chemicals. However, the initiative was written broadly enough to cover a wide range of other situations in which people are exposed to hazardous substances.

Under the law, businesses that have 10 or more employees must provide "clear and reasonable" warnings if they expose anyone, including their own employees, to a "significant risk" from chemicals known to cause cancer or birth defects.

A company that violates the law can be fined as much as $2,500 a day for each case of an illegal exposure. And, under the initiative's "bounty hunter" provision, any member of the public can bring an action alleging a violation of the law and receive a portion of any fines that are levied.

In the case of tobacco smoke, this means that anti-smoking activists will have a powerful new tool to use in their efforts to reduce the public's exposure to second-hand smoke—and persuade people to stop smoking.

"Warnings like this educate people that there is a health risk and create an incentive to restaurants and other establishments to provide people with a smoke-free environment," said Jim Shultz, a

Please see SMOKE, Page 25

Court Limits Liability of Schools in Sex Assaults

By PHILIP HAGER, *Times Staff Writer*

SAN FRANCISCO—The state Supreme Court, limiting the liability of schools for misconduct by employees, held Thursday that a school district may not be sued for the alleged sexual assault by a teacher on a 14-year-old boy.

responsible, the court concluded.

"To impose, in effect, strict liability in this context would be far too likely to deter districts from encouraging, or even authorizing, extracurricular and/or one-on-one contacts between teachers and students," Arguelles said.

The ruling was a victory for school administrators and districts throughout the state that had supported the Oakland Unified School District in seeking reversal of an appellate court decision upholding

istrators, backing the district, held that it was illogical and unfair to punish the district while ignoring the alleged guilty party, the

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nied a place in the public universities even though they are better qualified.

The study also called for ways to guarantee the transfer of students from community colleges to the upper divisions of UC or Cal State schools. And, it urged cooperation among the three segments of public higher education in building new campuses to meet an expected 42% increase in college-age Californians between 1990 and the year 2000.

The report even proposed that the UC, Cal State and community college systems build a joint facility called "a university park" which would tie together their programs. The joint committee's chairman, Assemblyman John Vasconcellos (D-Santa Clara) said the Presidio in San Francisco, the enormous military base that is facing closure, might be a good site. The idea, however, appears unlikely because UC officials oppose the concept.

The 256-page report, titled "California Faces California's Future: Education for Citizenship in a Multicultural Democracy," is the latest stop in a movement to reform California's three-tiered system of higher education. The schools are governed by a 1960 master plan that had its second review two years ago. That review led to legislation aimed at strengthening the community college system.

Vasconcellos, releasing the report at a news conference in the Capitol, said he considers the study a "blueprint" that will guide the state's public universities into the next century.

The assemblyman said the next step will be to translate the report into specific bills. He and other lawmakers said they think that at least some recommendations in the report would become law, although a long process of review and legislative action must be taken before any proposals can be implemented. Sixteen of the 18 Republican and Democratic legislators who formed the joint committee endorsed the report.

State Sen. Gary K. Hart (D-Santa Barbara), chairman of the Senate Education Committee, said he was encouraged by the bipartisan show of support. "It is increasingly difficult to reach consensus in this legislative body, between both houses, between both parties, on important public policy issues. This is an important breath of fresh air where there is consensus," Hart told reporters.

Assemblyman Tom Hayden (D-Santa Monica) predicted that "the essence of this report will become law."

But one of those critical of the report, Assemblyman Tom McClintock (R-Thousand Oaks), said he believes that the report will lead to racial quotas.

"Admission to the University of California and the California State University system should be based on a student's qualifications and merit and not on their skin color. This report seeks to institutionalize racial admissions policies, and I find that repugnant," McClintock said in a telephone interview.

The report stressed that special consideration in admissions to highly competitive campuses and majors should be given to students from minority groups and low income families—a practice often already followed.

[illegible] in the stress the Cal Grants scholarships that can be used at independent colleges.

[illegible] ity point for many Latino and black students, should get more attention and funds, according to the committee. The community colleges receive only about 25% of the per-student money for student services compared to UC campuses, the study said.

The report proposed that by 1992 all 106 community colleges must have agreements with at least three UC campuses and at least five Cal State campuses that will guarantee students the right of junior year transfer if they successfully complete a prescribed course of study. Also, every community college should have a counseling center to help transfer students.

According to master plan rules, students are eligible for UC if they rank academically in the top 12.5% of all state high school graduates, and can attend Cal State if they are in the top 33.3%. The report released Thursday called for guaranteeing admission to eligible students to one of the systems, although not necessarily to the campus and major of first choice.

Gordon reported from Los Angeles and Shuit from Sacramento.

SMOKE: Bars, Restaurants, Businesses to Post Warning Signs Saturday

Continued from Page 3

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Thompson added that many restaurants may not receive the notices in time to post them by Saturday, and other industry spokesmen agreed that many smaller establishments that do not belong to trade groups may be slower to learn about the law and post the required notices.

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"But one warning is all they get," she said.

Staff writer Ginger Thompson in Los Angeles contributed to this story.

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HEADLINE: NONSMOKER WARNINGS DUE UP SATURDAY

BYLINE: By RICHARD C. PADDOCK, Times Staff Writer

DATELINE: SACRAMENTO

BODY:

Thousands of signs warning nonsmokers that second-hand tobacco smoke can cause cancer will begin appearing Saturday in restaurants, bars and hotels throughout the state as a result of Proposition 65, the anti-toxics initiative.

The notices, which will be posted near the entrances of establishments and workplaces where smoking is allowed, are believed to be the first government-required health warnings to alert the public to the hazards of breathing secondary smoke.

The state-approved placards will read: "Warning: This Facility Permits Smoking and Tobacco Smoke Is Known to the State of California to Cause Cancer."

"We are printing signs by the thousands and shipping them off to our members all over the state," said Jo Linda Thompson, a spokeswoman for the California Restaurant Assn. "We've been printing and mailing all week long."

State Health and Welfare Undersecretary Thomas E. Warriner, who is overseeing the implementation of Proposition 65, said he expects broad compliance from restaurants, hotels and businesses that allow smoking on their premises. Some firms, he said, may simply prohibit smoking altogether as a way of avoiding the warning requirement.

"A company might decide now is a good time to go nonsmoking," Warriner said.

Proposition 65, which was overwhelmingly approved by the voters in 1986, was primarily intended to ensure that Californians can drink water that is free from contamination by toxic chemicals. However, the initiative was written broadly enough to cover a wide range of other situations in which people are exposed to hazardous substances.

Under the law, businesses that have 10 or more employees must provide "clear and reasonable" warnings if they expose anyone, including their own employees, to a "significant risk" from chemicals known to cause cancer or birth defects.

A company that violates the law can be fined as much as $2,500 a day for each case of an illegal exposure. And, under the initiative's "bounty hunter"

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provision, any member of the public can bring an action alleging a violation of the law and receive a portion of any fines that are levied.

In the case of tobacco smoke, this means that anti-smoking activists will have a powerful new tool to use in their efforts to reduce the public's exposure to second-hand smoke -- and persuade people to stop smoking.

"Warnings like this educate people that there is a health risk and create an incentive to restaurants and other establishments to provide people with a smoke-free environment," said Jim Shultz, a spokesman for Consumers Union, which supported the initiative. "Even if people won't stop smoking for their own health, they may think twice when they realize it's affecting their children and their loved ones."

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REGULATION
THE CATO REVIEW OF BUSINESS & GOVERNMENT

Secondhand Smoke
Facts and Fantasy

W. Kip Viscusi is the George G. Allen Professor of Economics at Duke University.

The regulation of public smoking has become an increasingly prominent policy issue. Many public and private institutions have instituted policies to restrict public smoking. Some have banned public smoking altogether. At a governmental level, the Occupational Safety and Health Administration (OSHA) has proposed banning all public smoking in the workplace, except for smoking in lounges that meet highly restrictive requirements. Recently the U.S. Environmental Protection Agency (EPA) also issued a report in support of legislation banning all public smoking.

The debate over taxing cigarettes has intensified as well. Advocates of higher cigarette taxes cite the health care costs inflicted by smokers on the rest of society. In 1994, for example, the proposed Clinton health care plan included a tax of 99¢ per pack of cigarettes, and a health care bill from the House Education and Labor Committee would have imposed a tax of $2.00 a pack. Unlike smoking restrictions of various kinds, taxes are not targeted mechanisms for addressing societal costs associated with environmental tobacco smoke (ETS), as opposed to reducing smoking more generally.

Smoking restrictions are a sensible and appropriate policy tool for limiting exposure to cigagarette smoke. However, that does not mean that all public smoking should be banned. The key policy issues are how broad such public smoking restrictions should be and who should have the responsibility for setting the restrictions. As with all regulatory policies, the overall benefits to society from such efforts should exceed the costs they generate.

As the percentage of nonsmokers in society has risen, the expectations of nonsmokers with respect to anti-smoking policies have steadily risen. Consider the following Gallup Poll results. In 1978 only 43 percent of all respondents believed that smoking on commercial airplanes should be banned completely. Similarly, in 1977 only 16 percent of respondents believed that smoking in public places should be banned. By 1987 the fraction of respondents supporting a complete ban on smoking in all public places had risen to 55 percent, and in 1988 it reached 60 percent. Within the course of only a decade there was dramatic surge in the strength of public support for smoking restrictions.

The presence of ETS is a classic externality problem. Smokers derive pleasure from their smoking activity, but it gives rise to a side effect that is undesirable for those exposed to the smoke. Clearly, we can restrict smoking activity, but doing so will decrease the welfare of smokers. How should we think about regulating smoking, and what is the appropriate extent of the regulation?

The Risks of Environmental Tobacco Smoke

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For many years nonsmokers viewed ETS as a smelly annoyance. Recently the stakes have been raised as opponents of smoking have begun to characterize ETS as a threat to individual health. The health dimension has changed the terms of the debate, greatly increasing the moral authority that nonsmokers are bringing to bear. It is therefore useful to inquire whether ETS is in fact a major threat to the health of nonsmokers.

Cancer researchers generally note that the body is resilient in the presence of some carcinogens. One whiff of ETS is proportionately less likely to be risky than massive and sustained exposures. Government agencies such as the EPA and OSHA have not made such distinctions, focusing instead on linear dose-response relationships. It is nevertheless instructive to assess the extent of the risks that the agencies have estimated. It should be noted at the outset that the consensus among economic researchers, including the Congressional Research Service, is that the state of science with respect to ETS is too uncertain to warrant estimation of the health consequences.

There are two classes of health hazards that have been linked to ETS: lung cancer and heart disease. Most of the public discussion has focused on the lung cancer estimates, whereas the heart disease estimates are both more speculative and much larger in magnitude. Let us consider each of these in turn.

The EPA's assessment of the lung cancer risks was based on a review of 11 studies of family members exposed to ETS. Only one of the 11 studies indicated statistically significant effects at the 10 percent confidence level, and in some cases the influences were in the "wrong" direction. Such statistically significant results can occur on a random basis. Rather than dismissing the linkages as not well established, the EPA averaged the implications of the studies to obtain a risk estimate. OSHA reviewed the same set of studies and applied different weights to derive a somewhat lower risk estimate.

The scientific studies used for the EPA and OSHA risk assessments in no way adjusted for the changing character of the cigarettes between the time of exposure and the current period, when tar levels in cigarettes are much reduced. In addition, studies of household members, as in all existing ETS studies, involve individuals exposed to much greater concentrations and longer durations of cigarette smoke than in public smoking contexts. The difference is particularly important if there is a no-risk threshold or nonlinear dose-response relationship.

More fundamentally, the studies failed to include the usual kind of detailed multivariate controls that are the norm in economic analysis. Smokers who choose to live in polluted areas or who are married to other smokers will tend to incur nonsmoking risks correlated with ETS because of a difference in risk-taking propensities. For example, my past research with Joni Hersch of the University of Wyoming has established that cigarette smokers and those who do not wear seatbelts are much more willing to work at hazardous jobs. A higher cancer risk for family members of smokers would be consistent with that type of pattern.

In terms of an overall cancer estimate, the EPA estimates that each year 2,200 people die from ETS exposures. Overall, 1,694 deaths are caused by exposures outside of the home. In the OSHA estimates of the risk levels, the total number of ETS deaths outside the home ranges from a lower bound of 444 to an upper bound of 1,150. Focusing solely on the workplace, the OSHA ETS risk range is from 171 to 880 lung-cancer deaths per year. Neither estimate is discounted or adjusted for the duration of life at risk.

The estimates of heart disease costs associated with ETS are considerably higher. The

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EPA estimates that 8,760 to 17,520 heart disease deaths per year are attributable to ETS. The estimates are based on a single study in the literature, a study that is replete with caveats made by the author, such as the following: "While the lung-cancer risk among never-smokers exposed to ETS is well established, a possible risk of heart disease due to ETS is more controversial. . . . There are many risk factors for heart disease, and it is difficult to control well for all of them. . . . A number of assumptions are involved in estimating the disease mortality due to ETS, adding an unfortunate level of uncertainty."

Perhaps the most important deficiency of the EPA and OSHA estimates is that the risk estimates for heart disease induced by ETS are implausibly large relative to the lung cancer risks for ETS, and given the direct estimates of the heart disease risk and other risks to the smokers themselves. Personal characteristics, which are likely to be correlated with risk and the social status of smokers, were omitted from the analysis.

Publication Pending

Are the Risks Significant?

In justifying its regulatory initiative with respect to public smoking in the workplace, OSHA maintains that it is obligated by its enabling legislation and related court decisions to regulate all "significant" risks. OSHA concludes that the lung cancer risks alone, which are the better established of the ETS risks, are significant, and consequently merit regulation. Since OSHA's interpretation of its regulatory mandate differs from the usual economic prescription that agencies should take a balanced view and pursue regulations that are in society's overall best interest, recognizing both benefits and costs, it is instructive to examine this risk-based rationale more closely.

In terms of the statistical significance of the effects, 10 of the 11 studies cited to justify the regulation fail to indicate a statistically significant linkage. But is the magnitude of the effects substantial, although perhaps not precisely established? In the 1980 OSHA *Benzene* case (*AFL-CIO v. American Petroleum Institute*), the Supreme Court indicated that a one in a billion risk from drinking chlorinated water would not be considered significant, but a one in a thousand risk from gasoline vapors would be significant. Are the risks from ETS significant?

To answer that question, OSHA took a lifetime risk perspective, and it is useful to apply that approach to the Supreme Court's view that a one in a billion risk from chlorinated water would not be significant. The amount of water people drink per day from different sources ranges from 2.1 to 2.9 quarts. To be conservative, I will assume that people drink nine glasses of chlorinated water per day (that may come, for example, from sodas or other products). The individual who drinks nine glasses per day each year for 70 years will drink 229,950 glasses during his lifetime. If the risk per glass is one in a billion, as hypothesized by the Court, the lifetime risk is two in ten thousand.

Now let us consider ETS. OSHA estimates that between 144 and 722 people will die from lung cancer each year because of ETS. If the 74 million nonsmoking American workers exposed to ETS are exposed over their entire 40-year employment expectancy, their lifetime risk ranges from one in ten thousand to four in ten thousand. Thus, the risk of drinking chlorinated water falls between the two bounds of the risk range estimated by OSHA for ETS. When translated into lifetime risks as opposed to risks from a particular exposure, so that both the ETS risks and the chlorinated water risks being discussed by the Court are in the same time dimension, we find that the risks are quite comparable and are of the same general magnitude.

Even if the flawed scientific evidence is taken at face value, the case for banning

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smoking in the workplace on risk-based grounds is not compelling. Quite simply, there are more important and fundamental threats to workers' lives than ETS. That does not mean that ETS should not be a matter of concern, but rather that one should take a balanced view and assess the overall merits of such regulation.

The Role of Market Forces

The market will in fact respond to ETS as it does in the case of other environmental amenities. After all, ETS is not the only aspect of the restaurant business that partakes of a public goods character; others include the music that is played and the general ambiance of the restaurant. If the restaurant is unpleasant, whether it be because the music is too loud or the ETS is annoying to nonsmokers, the customers will go elsewhere. Restaurants in turn will establish nonsmoking areas, since they have a financial interest in keeping their nonsmoking customers.

A similar kind of phenomenon occurs in the workplace. If workers perceive their exposures to ETS as unpleasant or risky, they will demand compensating differentials for those exposures. The resulting costs will in turn raise the cost to the employer of hiring smokers. Company responses may include the provision of smoking lounges or instituting local smoking restrictions in contexts where they are appropriate. One would expect such private bargains to be more balanced than regulations such as those initiated by OSHA, since the decisionmaker has an incentive to reflect on the consequences of the smoking restrictions both for smokers and nonsmokers.

For private-sector responses to work, there must be information to enable the parties to make sound decisions. To the extent that ETS has an unpleasant odor, this is a readily monitorable attribute. However, the potential risks associated with smoking are less easily assessed. Although risk perceptions may not be perfect, the nature of the systematic bias is that as a whole, people tend to overestimate the risk level. The direction of the bias is consequently the opposite of what would be needed to have a market failure that warrants government intervention.

In my past research, I have shown that the average American adult assesses the risk of lung cancer from smoking to be 0.43, far above the estimates based on the surgeon general reports that peg the risk at between 0.05 and 0.10. Similarly, people overestimate the overall smoking-mortality risk level, which they believe to be 0.54. In contrast, estimates based on the reports by the U.S. surgeon general peg that risk in the range of 0.18 to 0.36. People assess life expectancy loss from smoking as 11.5 years, which also greatly exceeds the estimated life expectancy loss based on available scientific evidence.

The ETS risks are also likely to be overestimated because of the substantial publicity they have received. The current public debate over smoking and ETS involves prominent officials from the EPA, OSHA, and the FDA. Most workers are aware of the ETS debate. Indeed, OSHA cites evidence indicating that "88 percent of nonsmokers are aware of the negative health consequences of ETS." The substantial publicity given to ETS issues may have led to exaggerated risk perceptions. The literature on the economics and psychology of risk perception clearly documents that highly publicized risks tend to be overestimated. The potential hazards of smoking are among the most highly publicized and widely discussed risks in our society.

The implication from the standpoint of compensating differentials is that the market response to the risk of smoking may in fact be excessive. Rather than leading to too little market accommodation of the preferences of nonsmokers, an exaggerated perception of

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the risk will lead to excessive restrictions on smoking in the workplace. Thus, it may be the case that the actions that have been undertaken are already too stringent from the standpoint of their overall social desirability.

Restrictions on workplace smoking are already quite widespread. A 1991 survey of company smoking policies found that 85 percent of all firms had smoking policies. Of those policies, 34 percent were bans, and another 34 percent involved prohibition of smoking in all open work areas. Moreover, over 90 percent of nonmanufacturing establishments also had smoking policies. As one might expect, smoking policies are more common in larger establishments than in smaller enterprises. There should be economies of scale in providing smoking areas in larger work environments and also a greater need to standardize smoking policies as opposed to letting the voluntary discussions of small workers' groups address the appropriate smoking policy on a decentralized basis.

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Insurance Costs of Smoking

Perhaps the most misunderstood element of the smoking debate is the health insurance cost of smoking. Smoking restriction advocates pegged this number at as high as one to two dollars per pack—without providing supporting evidence. Government agencies frequently make reference to additional insurance costs to justify restricting public smoking.

However, the nature of the insurance cost is mixed. If one assesses the insurance ramifications from smoking based on the assumption that smoking is a very risky and dangerous activity, then the consequences involve much more than higher health insurance costs from smokers being treated for illnesses. If substantial risks are indeed present, then smoker mortality rates will be higher as well. The earlier deaths of smokers, who are less likely on average to live through their post-retirement years, will in fact provide insurance savings.

The cost-per-pack figures shown in Table 1 (page 46) are based on the assumption that the adverse health consequences of smoking occur over a 20-year period, so that, for example, smokers do not die immediately upon lighting a cigarette. The estimates for other reasonable time distributions are similar. For concreteness, I focus on the set of results using a real discount rate of 3 percent. Overall, smokers impose higher medical-care costs of 46¢ per pack; higher sick-leave costs of 1¢ per pack; greater life-insurance costs of 11¢ per pack; additional costs due to fires of 2¢ per pack; and foregone Social Security taxes on their earnings of 33¢ per pack.

If, however, one counts the insurance costs associated with smoking, for symmetry one should also recognize the insurance benefits. Since smokers are estimated to die sooner, they will spend less time in nursing homes, and fewer will live long enough to collect their retirement pensions. As a result, smokers save society 20¢ per pack in nursing-home care and $1.00 per pack in terms of lower pension and Social Security costs. On balance, smokers save society 27¢ per pack from an insurance standpoint. This amount excludes the role of the taxes smokers pay, which average 53¢ per pack of cigarettes.

If we also recognize the costs associated with secondhand smoke, then the calculus becomes more even. Using the upper-bound EPA estimates of the ETS body counts in conjunction with a figure of $5 million per life lost, I have estimated that the external cost per pack of cigarettes is as high as 41¢ per pack. Since this amount is also below the taxes smokers pay per pack, even the highest estimate of the smoking externalities that

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has been put forth by any government agency fails to indicate that smoking is a losing monetary proposition for society.

The social desirability of smoking clearly hinges on much more than the insurance-cost tally. However, an accurate accounting of the insurance costs is essential to avoid distorting the legitimate issues associated with public policy toward smoking.

Losses to Smokers

Virtually all of the public debate over smoking restrictions has focused on the costs borne by nonsmokers. However, any restrictions will necessarily reduce the welfare of smokers, who will have to forgo a consumption activity they enjoy. If smoking is banned in the workplace or substantially limited, smokers will have fewer opportunities to smoke. If smokers are relegated to a specific smoking area, their welfare will also be decreased, and their productivity may be affected as well.

Consider first the magnitude of the lost consumers' surplus (the difference between how much consumers pay for cigarettes and what they would be willing to pay) from the decrease in demand for cigarettes that will result from limitations on workplace smoking. To estimate the amount of the consumers' surplus for the market, the critical component is the shape of the consumer demand curve. More specifically, what is the elasticity of demand, or the percentage change in the quantity of the good purchased that will result from a unit percentage change in its price?

Table 2 (page 48) presents estimates of lost consumers' surplus for five different elasticity estimates ranging from -0.2 to -1.4. Most of the demand elasticities cluster in the range of -0.4 to -1.0, and estimates for teenagers have pegged the elasticities at the high end of -1.4. For illustrative purposes, I will focus on the demand elasticity of -0.4.

At that demand elasticity, before the enactment of the OSHA regulations, consumers would reap a surplus of $53 billion annually. In other words, smokers would be willing to pay $53 billion more for cigarettes than they are actually charged. The loss in consumers' surplus depends on the effect of the smoking restrictions on the level of smoking. The estimates in Table 2 pertain to three different scenarios in which restrictions reduce the total consumption of cigarettes by 10 percent, 20 percent, and 30 percent, respectively. Focusing on the midpoint of this range, after the smoking reduction one has a consumers' surplus of $34 billion, leading to a total consumers' surplus loss of $19 billion annually. For demand elasticities that indicate less responsiveness to price, there will be a larger estimated consumers' surplus loss, and for demand elasticities indicating a greater responsiveness to price, there will be a smaller welfare loss.

The second party that loses because of the decrease in smoking is the tobacco industry or, more specifically, the shareholders of those firms. Panel B of Table 2 reports a series of calculations that assume for simplicity's sake that profits are proportional to sales. A 20 percent reduction in cigarette consumption will lead to a loss in profits of approximately $0.2 billion per year. That calculation excludes the lost profits to tobacco farmers and other groups whose economic well-being is dependent on the tobacco industry.

The final component of the societal loss that I have calculated pertains to the lost tax revenue from a reduction in smoking. If there is a 20 percent reduction in cigarette consumption, the total loss of tax revenues will be $2.3 billion, with the loss being

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roughly evenly split between federal and state governments.

My calculations suggest that the effect of the proposed regulation in reducing smoking in the workplace and smoking overall will be nontrivial. Moreover, the group with the greatest amount to lose will not be the tobacco industry, but rather the individual smokers who will suffer an annual welfare loss on the order of $11 billion. The group that will suffer the second greatest loss will be the recipients of the cigarette taxes. The federal and state tax loss will exceed the loss in profits to companies by a factor of 10. None of those effects of the proposed OSHA regulation were addressed in the regulatory impact analysis prepared by OSHA.

OSHA's neglect of the cost component of the regulation is even more extensive. OSHA estimates the overall cost of eliminating ETS exposures as ranging from zero to $68 million. One might wonder how the agency could ban smoking in the workplace and mandate restricted smoking areas meeting stringent ventilation requirements without imposing any costs. OSHA's strikingly low cost figures should serve as a red flag for anyone considering the reasonableness of the cost estimates.

OSHA was able to get such low numbers by neglecting the capital cost for creating nonsmoking areas. Although OSHA did recognize that there may be costs involved in setting up appropriate ventilation systems, it assumed that every workplace in the country, ranging from barber shops and greeting-card stores to large factories, had available at no cost rooms that could be converted to smokers' lounges. In effect, OSHA treated office space as a free good in excess supply. The notion that every enterprise in the country has a 150-square-foot room available at no cost to set aside for smokers is certainly implausible.

More generally, the indoor air quality regulation, which includes restrictions other than those pertaining to ETS, has associated direct costs estimated by the agency to be $8.1 billion annually. However, OSHA estimates that there will be cost savings of $15 billion to firms annually from improving workplace air quality. In effect, OSHA claims that the regulation is not only a no-lose proposition for business, but will in fact be a source of increased profits.

One might wonder why American entrepreneurs are so ignorant that they fail to recognize an opportunity to make almost two dollars for every dollar expended in implementing smoking restrictions. Such entrepreneurial shortcomings cannot be attributed to market imperfections such as an alleged lack of worker information about the risks of ETS, since the cost savings OSHA projects yield productivity gains and other effects on firms' profitability. If a regulation has positive net financial effects even if we do not take into account any of the health benefits, then surely profit-seekers would jump on the opportunity. The fact that firms have to be coerced into taking such measures is a signal of the lack of internal consistency and plausibility of the cost estimates that have been put forth.

Thinking about Smoking Restrictions

The anti-smoking fervor has led to the support of a variety of initiatives that would dramatically restrict public smoking. The linchpin of those efforts has been the estimated health impact of ETS on nonsmokers. However, the existence of health effects has led many participants in the debate to lose sight of the competing interests involved.

The existing scientific evidence is highly speculative. Existing studies focus only on

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exposure of other household members and fail to control adequately for household characteristics correlated with a smoking spouse that may lead to risks of lung cancer and heart disease. What is needed is a rational assessment of the risks, rather than an advocacy perspective from either side. Instead of focusing on worst-case scenarios, we should be seeking out the best available scientific evidence. Available scientific studies may not be conclusive, but that fact alone should not necessarily be a rationale for inaction. On the other hand, we should not be swayed by fragmentary evidence that is inconsistent with other, better-established relationships, such as the magnitude of the risks to smokers themselves.

Regardless of which ETS risk estimates one employs, the ETS costs to society are clearly not infinite. Indeed, if we calculate the costs of ETS as well as the other insurance-related costs generated by smokers, cigarette smokers still pay their own way, given the taxes they pay for consuming the product. The financial merits of the case, even after monetizing the ETS costs, in no way justify restrictions on public smoking.

That is not to say that some form of smoking regulation in particular contexts would not be desirable. Nonfinancial concerns are also relevant. However, when we examine the desirability of smoking regulations, we should recognize the competing effects such efforts have. Smokers lose a substantial benefit to their welfare by having their smoking activity restricted, and losses accrue to society in terms of foregone taxes. Companies suffer foregone profits. There are also direct costs of restrictions, such as the expense associated with setting aside smoking areas and the possible productivity loss from impeding smoking behavior.

In many contexts, the market is well equipped to deal with such tradeoffs by reflecting the competing costs and benefits of restricting smoking. Indeed, most enterprises in the United States have enacted smoking-related policies. Provided that such efforts are not motivated by excessive reactions to publicity associated with ETS, they will be well founded.

For the government to promulgate sound regulations, it should follow the same kind of thought process that would be adopted in the market. Indeed, a useful starting point would be for there to be an assessment of which situations the market will not deal with adequately, since otherwise there is no need for government intervention. In any event, there is a need for reason and balance in recognition of the welfare consequences of smoking restrictions, not only for nonsmokers but for smokers and society at large.

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Tobacco Industry Publications

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ARNOLD, FORTAS & PORTER
[illegible] WASHINGTON, D. C. [illegible]

Cipollone

May 23, 1964

Messrs. Ramm, Hetsko, Haas, Russell, Smith, Fennin, Austern and Wald.

Gentlemen:

At our meeting in Washington on May 7, 1964, a decision was reached to proceed, on a preliminary basis, with a public opinion survey which we hoped would establish that there is a very high level of public awareness concerning the health issue involving cigarette smoking. It was contemplated that the results of this survey would be used as a basis for testimony at a Congressional hearing.

Subsequently, Herbert Dym of Covington & Burling, Bill Haas of Wald, Harkrader & Rockefeller, and my associate, Richard Sobol, made a trip to Michigan State University and to the University of Chicago to discuss the survey and related problems with the two marketing experts we had previously retained. I am informed that both of these experts strongly urged that a survey be taken. On Monday, May 18, Henry Ramm telephoned me and expressed concern over possible adverse use of such a survey by the FTC or other persons. I assured Mr. Ramm that I would not proceed with the survey until I received further instructions from counsel representing the six companies, and I immediately issued instructions to that effect.

I asked Mr. Sobol to prepare a background memorandum concerning the survey, which is enclosed herewith. A copy of

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the proposed questionnaire is also enclosed. I am informed that if the results of the survey are to be available for use prior to the end of June, we must notify the research organization of our decision by May 27 or May 28.

My personal regards.

Sincerely,

Abe Krash

Enclosures

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MEMORANDUM

TO: Messrs. Ramm, Hetsko, Haas, Russell, Smith, Yeamin and Austern

SUBJECT: CONSUMER SURVEY

It has been suggested to us by experts in the field of marketing and communications -- Professor Gary Steiner of the University of Chicago Graduate School of Business, and Professor David Berlo of the Department of Communications, Michigan State University -- that strong support for the industry position that labeling and warnings in advertisements are not necessary might be developed through a public opinion survey. Such a survey would attempt to establish six basic propositions:

1. That there is greater public awareness of the charges against smoking than there is of numerous other important public issues;

2. That a very high percentage of the American public believes there are risks to health involved in habitual smoking of cigarettes;

3. That the risk to health is overestimated (accepting as a basis for comparison the statistics in the Surgeon General's report and the Royal College report);

4. That there is substantially greater public awareness of the possible risks of cigarette smoking than there is of such other health issues as the cholestorol question, drinking and obesity;

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5. That persons who do not know of the health issues probably would not be reached by warnings in any event;

6. That advertising does not have as much to do with the social acceptability of smoking as do numerous other personal and psychological factors.

The Legal Committee considered this proposal at its meeting in Washington on May 7, 1963, and authorized a survey on a pilot basis. We requested Professor Steiner to formulate questions that might be used. A draft questionnaire prepared by Professor Steiner has been thoroughly revised with a view toward seeking information on the above listed propositions without raising extraneous issues. It is the opinion of Professors Berlo and Steiner that the survey is likely to establish these propositions.

If Professors Berlo and Steiner are correct in predicting that the returns will be favorable, it is possible that this information could be of significance to the industry both for its Congressional presentation and for other purposes. If, for example, we were able to establish that the American consumer overestimates the risks of habitual smoking, the case for warning or labeling would be weakened.

The time factor severely limits our flexibility in adopting plans for the implementation of this survey. In the time available, i.e., in order to get analyzed returns before the end of June, we would be able only to take a survey of

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one major area. Further, even within that limitation, we would not be able to obtain various well known research organizations such as Elmo Roper. Professor Steiner has recommended Elrich & Lavidge, Inc., which is a very highly-respected market planning and research organization in Chicago. Elrich & Lavidge has also been used by a client of Covington & Burling and is held in high regard by Stan Tempko. The geographic area for this study would be the Chicago metropolitan and suburban area. The cost (on an accelerated study) would be $18 an interview. It has been recommended that we do 1,000 interviews on a sampling carefully selected to achieve an accurate cross-section of that area. The cost of the survey would thus be $18,000, including tabulation.

A 1,000 interview sample could be completed by Elrich & Lavidge and analyzed by Professor Steiner in time for testimony in the last week in June. A smaller sampling could be completed a week or so earlier.

The question has been raised of possible adverse use of a survey. Specifically, Mr. Austern has suggested that should the results of the survey prove unfavorable, they may be subpoenaed or otherwise may fall into the hands of the FTC, a Congressional Committee, or a plaintiff in pending cancer litigation. There is no question that some risk exists. We have been assured by both Elrich &

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Lavidge and by Professor Steiner that they would transmit to us every interview and every copy of the analysis. Thus, when it is completed, there will be nothing in the records of Elrich & Lavidge or Professor Steiner to subpoena. The danger of a successful subpoena would be reduced (though not entirely eliminated) if the survey were in an attorney's files. In any event, if the returns were unfavorable they could be destroyed and there would be no record in any office of the nature of the returns. The possibility of compelling oral testimony from Steiner, of course, always exists.

Another drawback of the proposal is that neither Professor Steiner nor any other reputable person in the field will testify as to the results of the poll and exclude the answers to certain questions from his analysis. In other words, if the returns on a particular question are unfavorable but the survey otherwise is favorable, it will be necessary either not to use the survey or to use the unfavorable data as well. In the attached draft questionnaire, we have tried to avoid that problem by avoiding unnecessary questions which might elicit answers harmful to us. The questionnaire has been revised to eliminate questions that might upset an otherwise favorable return.

In sum, there are risks. However, there are also potential benefits of real substance. The issue to be resolved is whether the risks of the pilot project outweigh the advantages which we

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may realize. A decision on this question will be necessary one way or the other in the immediate future if we are to be able to have the returns in time for use before the Congressional hearing in June.

Arnold, Fortas & Porter

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DRAFT QUESTIONNAIRE

We're making a survey about some of the things that people are talking about these days, and would like to get your opinion on some things. This will only take a few minutes.

1. Would you say that having one or two drinks a day before dinner is

. . .perfectly all right?

. . .probably shouldn't do it, but it isn't serious?

. . .definitely not advisable?

2. How about staying roughly 10 lbs. overweight -- that is, heavier than the ideal weight suggested by doctors? Would you say that's

. . .perfectly all right?

. . .probably shouldn't do it, but it isn't serious?

. . .definitely not advisable?

3. How about smoking about a pack a day? Would you say that is

. . .perfectly all right?

. . .probably shouldn't do it, but it isn't serious?

. . .definitely not advisable?

4. Which of these three is the least advisable?

. . .having one or two drinks daily

. . .staying roughly 10 lbs. overweight

. . .smoking a pack a day

5. Have you ever heard the phrase, "The War on Poverty"?

Yes No

IF YES:

5a. In what connection?

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6. Have you ever heard of the so-called "Public Accommodations Clause" in the proposed Civil Rights Bill?

Yes No

IF YES:

6a. What would it provide for?

7. Have you ever heard of the "Mustang"?

Yes No

IF YES:

7a. What is it?

Now, I would like to talk to you specifically about smoking.

If smoking a pack a day is not "perfectly all right" (Q. 3)

8. I notice you feel smoking is (something you probably should not do) (not advisable). Why is that?

VERBATIM_____

PROBE FOR DETAIL_____

_____

9. In general, would you say that regular cigarette smoking involves

. . . no risk at all?

. . . a very slight risk?

. . . a substantial risk?

. . . an extremely serious risk?

10. IF ANY "RISK":

What risks, specifically, do you think a smoker takes?

VERBATIM_____

Anything else?_____

PROBE FOR SOURCE OF INFORMATION_____

- - - - -

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IF SURGEON GENERAL'S REPORT NOT SPECIFICALLY ALREADY MENTIONED BY NAME:

11. Have you by any chance heard of the Surgeon General's Report on Smoking and Health?

Yes No

IF YES:

12. Do you have any idea what the major conclusion was?

IF YES:

12a. What was it?

VERBATIM_____

13. There's been quite a bit of discussion about cigarettes and cancer. In your opinion, is a link between lung canter and cigarette smoking

. . .established?

. . .probably established?

. . .not established?

IF "PROBABLY" OR "NOT ESTABLISHED":

14a. When all the facts are in, do you think it will turn out that smoking is or is not a cause of lung cancer?

14b. Why do you feel it (is established) (will turn out that way)?

PROBE FOR SOURCE_____

IF "ESTABLISHED" OR "WILL TURN OUT THAT WAY":

15. (Alternative forms -- each to be asked of 50% of the sample):

A. Just to get a rough idea of the degree of risk, would you take a guess at this: Suppose an average man smokes a pack a day from his late teens, would you say his chances of contracting lung cancer are:

. . .almost certain?

. . .50-50?

. . .1 in 10?

. . .1 in 20?

. . .1 in 100?

IF

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B. Just to get a rough idea of the degree of the risk, would you take a guess at this: Suppose 100 men all started smoking in their late teens, and smoked a pack a day from then on. About how many of them do you guess would get lung cancer? (Just a guess).

_____

16. Are there any (other) possible harmful effects of smoking?

Yes ___ No ___

IF YES:

16a. What are they?

VERBATIM _____

17. Here are some statements people have made about smoking. I'd like to get your reaction to each one. Just indicate whether you generally agree or disagree.

STATEMENTS ON CARDS, SORTED INTO TWO FILES: "AGREE" & "DISAGREE"

Items for card sorting:

Most cigarette advertising is bunk

Cigarettes seem to "go with" a drink

Smoking is probably more harmful to health than overeating slightly

The dangers of smoking are much exaggerated

Smoking is "the thing to do"

Men who are really masculine are likely to be smokers

The dangers of smoking are probably underestimated by many smokers

Cigarette smoking is dangerous to health. It may cause death from cancer and other diseases

Women who are really feminine are likely to be smokers

A man who smokes is more attractive to women

A woman who smokes is more attractive to men

Today, most cigarette advertising is completely truthful

Smoking contributes to heart disease

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Smoking contributes to bronchitis

Smoking "belongs" at the beach

There is nothing whatever to worry about if you smoke

CLASSIFICATION DATA

1. Normal demographic and social data

2. Smoking behavior

(1) Do you now smoke (cigarettes)? YES NO

(cigars)? YES NO

(a pipe) YES NO

IF YES, SMOKES CIGARETTES:

About how many cigarettes a day?_____

IF NO:

Have you ever smoked cigarettes?_____

(IF YES: When did you stop smoking cigarettes?_____

Why did you stop?_____

IF RESPONDENT SMOKES AND THINKS THERE IS A HEALTH RISK IN SMOKING: PROBE:

Several people I have talked to are smoking even though they indicate that it may be harmful. How would you explain that?

VERBATIM_____

How do you, personally, think about this matter of smoking and health? (What would you say if someone asked you why you smoke even though you think there's a risk attached to it?)

VERBATIM_____

3. Miscellaneous additions to classification data:

Do you serve cocktails or drinks at a party?

. . . almost always

. . . sometimes

. . . never

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How about before dinner (on an ordinary day)?

. . . almost always

. . . sometimes

. . . never

Interviewer rates weight: Very thin____Average____Stout____

Very much overweight_____

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